87-42

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. _____

DONALD JOSEPH CLIFT, On Behalf of Himself, and all Others Similarly Situated,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL & IMPLEMENT WORKERS OF AMERICA (UAW), et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Are some federal circuit courts of appeals creating an expanding conflict of opinions with their general application of a narrow time limitation developed by this court for a specific type of labor law suit?

2. Does the general application of this time limitation discriminate by denying labor union members civil rights and democratic processes guaranteed by federal labor law and the Fifth Amendment to the United States Constitution?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Donald Joseph Clift, Jesse O'Neil Hatcher, Stanley Boyd Wilson, Jr. and Donald W. Romaine, individuals, and the class denied certification by the District Court on the 9th day of April, 1985, consisting of three hundred fifty (350) union employees who were on lay off from the International Harvester Plant in Indianapolis on May 2, 1982.

The respondents before this court are International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); Region 3, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); Local 98, United Automobile Aerospace & Agricultural Implement Workers of America (UAW); and International Harvester Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Donald Joseph Clift, and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceedings on May 6, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported and is reprinted in the appendix hereto, p. A-2, infra. The judgment of the United States District Court for the Southern District of Indiana (Steckler, D.J.) was not reported by direction of the district judge. It is reprinted in the appendix hereto, p. A-23, infra.

JURISDICTION

Petitioners invoked district court jurisdiction under the Labor-Management Reporting & Disclosure Act of 1959 (LMRDA) 29 U.S.C. Secs. 411 and 412 and the Labor Management Relations Act of 1947 (LMRA) 29 U.S.C. Sec. 185, and brought this action in the Southern District of Indiana. On April 9, 1985, the District Court granted respondents' motions for summary judgment, in effect dismissing petitioners' case. See p. A-17, infra.

Upon petitioners' appeal, the Seventh Circuit, on May 6, 1987, entered a judgment and an opinion affirming the Southern District's order that petitioners' complaints be dismissed having found petitioners' claims to be time-barred by Sec. 10(b) of the National Labor Relations Act (NLRA). No petition for rehearing was sought.

The jurisdiction of this court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

28 U.S.C. Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals of all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be heard in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295.

STATEMENT OF THE CASE

This appeal requires an examination of the meaning and application of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), Title I, Secs. 101 and 102, 29 U.S.C. Secs. 411 and 412; the Labor Management Relations Act of 1947 (LMRA), Sec. 301, 29 U.S.C. Sec. 185; and the National Labor Relations Act (NLRA), Sec. 10(b), 29 U.S.C. Sec. 160(b).

The LMRDA Title I is the "Bill of Rights of Members of Labor Organizations". It regulates the internal affairs of unions and union members. Section 101 provides equal rights and privileges in such matters as freedom of speech, freedom of assembly and voting rights. Section 102 permits a union member to bring a violation of his civil rights to Federal Court.

The LMRA, Sec. 301, provides an avenue for an employee to sue "both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164 (1983) (Citations omitted). "Such a suit, as a formal matter, comprises two courses of action. The suit against the employer rests on Section 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is for breach of the union's duty of fair representation which is implied under the scheme of the National Labor Relations Act." Id. This action is known as a typical hybrid section 301/fair representation claim.

The NLRA Sec. 10(b) establishes a six-month time limitation for the filing of a charge of unfair labor practices. This appeal turns on the application of the Sec. 10(b) time limitation to the petitioners' claims under Title I, LMRDA and Sec. 301, LMRA.

The petitioners are employees of International Harvester Company (Harvester), currently operating as 'Navistar', at its engine plant in Indianapolis, Indiana, and are members of International Union, United Automobile, Aerospace, Agricultural & Implement Workers of America (UAW) and its affiliates Region 3 and Local 98. (Collectively, the Union).

The respondents are parties to a Collective Bargaining Agreement dated May 2, 1980, known as "Master Agreement". "Master Agreement", at Article XVI, Sec. 6(e), provides for the consideration of seniority employees for voluntary employer-approved transfers between respondent Harvester's plants, provided their work operations travel with them. In late 1981 and early 1982, the respondents entered into negotiations to supplement the "Master Agreement". Negotiations were conducted in Chicago, Illinois in a confidential manner. and the membership of Local 98 was not advised at any time of the specific content of any proposed supplement or amendment to "Master Agreement" under consideration by the respondents.

On May 2, 1982, a special meeting was called to ratify the supplements negotiated between the respondents. No notice of the meeting was provided to approximately Three Hundred Fifty (350) employee/members who were on layoff from Harvester at that time. Furthermore, all employee/members who had been on layoff for more than six (6) months, and many employee/members who had been on layoff for less than six (6) months, were, by Union Executive Order, specifically denied the right to vote at the meeting.

Petitioner members were denied proper notice and thereby an opportunity to even speak on the ratification of the supplemental agreement. They were clearly eligible to vote as they had a property right (seniority) sufficient to entitle them to vote on a matter that would drastically alter their layoff and recall seniority rights. The disputed supplemental agreement, known as "Master Recall", includes provisions amending the transfer provisions of "Master Agreement" by requiring the transfer of employees with full seniority rights from defunct Harvester plants to another operational facility.

The negotiations and the subsequent amendments to "Master Agreement" were at all times represented by respondents as being in the nature of 'economic concessions' to facilitate continued operations at Harvester plants across the country. "Master Recall" was not an economic item of interest to Harvester and was not an item of primary economic

interest to those employees not on layoff. It was an item of primary political interest to the UAW hierarchy. As a result, "Master Recall" had a disasterous impact on the layoff and recall seniority rights of the laid-off Three Hundred Fifty (350) employee/members who were denied the right to vote at the May 2, 1982 meeting.

"Master Recall" was ratified by a vote of Two Hundred Thirty-five (235) for and One Hundred Twenty-nine (129) against. Clearly, the votes of the Three Hundred Fifty (350) employee/members who were denied the right to vote and who were adversely affected by any changes in "Master Agreement", pertaining to layoff and recall seniority rights, would have had a substantial impact on the outcome of the ratification vote.

As a result of the respondents' secrecy in both the negotiation and ratification stages of "Master Recall" the petitioners, after being recalled from layoff, remained unaware of the diminution of their recall seniority rights until April, 1983. At that time, approximately Two Hundred Fifty (250) employees were transferred to the Indianapolis facility with full seniority rights, thereby displacing the petitioners with respect to their accrued layoff and recall seniority rights.

Some of the petitioners sought redress through the grievance procedure outlined in "Master Agreement". However, it soon became apparent that grievance/arbitration proceedings were not applicable, thereby requiring the petitioners to seek other means of redress. The International Constitution of respondent UAW and the Bylaws contained therein provide for the calling of a special meeting of a local affiliate upon the petition of twenty-five (25) members. On June 12, 1983, a petition bearing the signatures of over One Hundred Fifty (150) employee/members was presented to the vice-president of Local 98.

The petition requested a special meeting of Local 98 to consider nullification of the original ratification vote and a new vote so that all eligible members could be afforded their voting rights. On July 20, 1983, the president of Local 98 responded by letter that the petitioners' request could only be considered by International UAW. On August 5, 1983, the

petitioners' attorney wrote International UAW requesting clarification of the response from Local 98. Petitioners were then advised, in writing by International UAW, through the office of the president, that their request could only be heard by first appealing to Local 98. In August of 1983, Local 98 and Region 3 mailed to the employee/members, at their homes, a letter advising them to cease and desist their efforts in this matter, and threatened them with financial responsibility for any legal fees incurred by the respondents.

Having nowhere else to turn, the petitioners then filed a class action in the Southern District of Indiana for injunctive relief and damages for violations of the Labor-Management Reporting & Disclosure Act of 1959 (LMRDA), Title I, Secs. 101 and 102, 29 U.S.C. Secs. 411 and 412, and the Labor Management Relations Act of 1947 (LMRA) Sec. 301, 29 U.S.C. Sec. 185. Specifically, the petitioners' complaint requested 1) a determination that the suit be maintained as a class action on behalf of the class; 2) a determination of the Defendant class; 3) a finding that the petitioners had exhausted their internal remedies with no relief; 4) the issuance of a preliminary and permanent injunction to enjoin the respondents from enforcing the provisions of "Master Recall"; 5) a return to the status quo ante; and 6) punitive damages in the amount of Thirty-five Million Dollars ($35,000,000.00).

The basis for the complaint was that the respondents illegally adopted and ratified "Master Recall". It is undisputed that petitioners were denied their right to vote on "Master Recall". These unlawful actions by respondents have deprived the petitioners of their right to vote as guaranteed by Title I of the LMRDA, effectively depriving them of a valuable and unique property right, their seniority. It was this deprivation of voting rights which gave rise to a consequential complaint. Specifically, the respondents unlawfully interpreted, negotiated and implemented the "Master Agreement" between Harvester and UAW and the Local Supplemental Agreement on Seniority between Harvester and Local 98, thereby violating the LMRA.

It is further the case that the above actions of the respondents violated petitioners' rights guaranteed by the UAW Constitution, and the Constitution and Bylaws of Local 98. Petitioners alleged in their Second Amended Complaint, filed May 9, 1984, that these collusive actions deprived them of a seniority property right, without due process, in violation of the Fifth Amendment to the United States Constitution.

On December 5, 1983, petitioners filed a Motion for Determination by Order that a Class Action Be Maintained. The District Court denied petitioners' motion to have the case certified as a class action, by declaring it moot after the District Court entered its final judgment. The respondents filed a motion for summary judgment on grounds that petitioners' LMRA Sec. 301 claim was time-barred by Sec. 10(b) of the NLRA. Included in their motion was a request that the court apply LMRA, Sec. 301 and thus, the time limitation of Sec. 10(b) of the NLRA, to bar petitioners' LMRDA Bill of Rights claim. Harvester included in their motion for summary judgment an additional premise that, as an employer, they were not a proper party to an LMRDA lawsuit.

Petitioners filed a timely brief in opposition to the respondents' motions for summary judgment showing that it was proper for Harvester to be made a defendant in an LMRDA suit, and that the petitioners had exhausted their administrative remedies. Furthermore, consistent with federal policy, that the appropriate statute of limitations should be borrowed from analogous Indiana statutes regarding tort and contract actions.

The District Court sustained respondents' motions for summary judgment as to LMRDA Secs. 101 and 102, finding the claims time-barred by the statute of limitations 'borrowed' from Sec. 10(b) of the NLRA, as applied in typical hybrid 301/fair representation cases. The court drew this conclusion from their application of Sec. 10(b) to petitioners' secondary LMRA claims.

The Seventh Circuit Court of Appeals upheld the Judgment of the District Court, which dismissed petitioners' claims. The District Court and the Court of Appeals admitted that actions brought under LMRDA and LMRA are unique in

that neither contains its own statute of limitations. As both courts recognized, the proper starting point in such a case is to borrow the most analogous state statute of limitations. Having said that, however, both courts began their analyses with a discussion of the appropriate federal statute of limitations. This reverse analysis is in direct conflict with the conclusion in DelCostello that absent a federal statute of limitations, "Congress intended that the courts apply the most closely analogous statute of limitations under state law". 462 U.S. at 158.

Only by incorrectly classifying petitioners' LMRDA and LMRA claims as those of a typical 301 hybrid case was the District Court able to find that the appropriate statute of limitations was that of Sec. 10(b) NLRA. This classification is flawed. All the petitioners' claims commence with a Title I, LMRDA "Bill of Rights" violation, and thus are virtually independent of any contractual provisions governing relations between the parties. The need for uniformity of time limitations in Sec. 301 'hybrid' cases is simply not present in this case.

REASONS FOR GRANTING THE WRIT

I.

THE APPLICATION OF DelCOSTELLO TO LMRDA CLAIMS IS CREATING WIDESPREAD CONFLICT AMONG THE LOWER COURTS

This court fashioned its application of the NLRA Sec. 10(b) six-month time limitation to unfair labor practice claims against both the union and an employer, (hybrid Sec. 301/fair representation claims) with DelCostello v. International Brotherhood of Teamsters, et al., 462 U.S. 151 (1983) for reasons that do not apply to pure, free standing LMRDA claims.

First came the conclusion that "state limitation periods for vacating arbitration awards are inadequate for a hybrid Sec. 301/fair representation suit." Id. at 166. This court then determined that analogous state statutes of limitation are

unrealistically long for application to fair representation claims. Analogous state limitations, such as for malpractice, generally "preclude the relatively rapid resolution of labor disputes favored by federal law." Id. at 168. As noted in DelCostello, this disparity worked against the "employees' ability to recover most of what is due them" because of the short arbitration limitations period. Id. This court then found a "family resemblance" between unfair labor practices, breaches of duty and employer violations of a collective bargaining agreement. Id. at 170.

In light of the foregoing conclusions and the need for uniformity and a balancing of the interests, this court adopted Sec. 10(b) of the NLRA for use in hybrid Sec. 301/fair representation suits involving arbitration and grievance proceedings. Id. at 171. This court twice cautioned that the DelCostello opinion is not to be seen as a departure from the established federal policy of borrowing state limitation periods for federal causes of action, stating finally that "resort to state law remains the norm". Id. As Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986) noted in a footnote:

> Several courts have taken this statement to heart and have refused to apply, to other situations as well as the one before us, the six month statute of limitations which the Supreme Court in DelCostello borrowed from the National Labor Relations Act. See, e.g., Monarch Long Beach Corp. v. Soft Drink Workers, Local 812, International Brotherhood of Teamsters, 762 F.2d 228, 331 (2d Cir. 1986) (company sues union for damages for injuries from secondary boycott; court narrowly construes DelCostello and turns to state law for limitations period); United Brotherhood of Carpenters and Joiners of America, Local 1020 v. FMC Corp., 724 F.2d 815, 817 (9th Cir. 1984) (union seeks to set aside arbitration on ground decision does not draw essence from collective bargaining agreement; court rejects DelCostello and adopts law on challenging arbitration); International Union of Electrical, Radio and Machine Workers v. Ingram Manufacturing, 715 F.2d 886,

888-89 (5th Cir. 1983) (same, employer seeking to set aside arbitration); Bernard v. Delivery Drivers, 587 F.Supp. 524, 524-5 (D. Colo. 1984) (rejecting section 10(b) for LMRDA claim because reasoning of DelCostello inapplicable); Gordon v. Winpisinger, 581 F.Supp. 234, 238 (E.D.N.Y. 1984).
784 F.2d at 5, fn. 4.

As the reasoning in DelCostello is illuminated it becomes clear that the ruling was tailored especially to provide uniformity of time limitations for "hybrid" 301 suits that deal solely with contract violations, arbitration decisions and grievance denials.

In the present case, the District Court applied the NLRA Sec. 10(b) time limitation to appellants' pure, free standing LMRDA Title I claim. DelCostello does not provide for such application. The District Court's ruling was improperly based on a string of cases leading down from DelCostello to Vallone v. Teamsters Local 705, 755 F.2d 520 (7th Cir. 1984). The plaintiff in Vallone lacked standing to qualify for a claim under LMRDA and the Seventh Circuit affirmed the application of Sec. 10(b). The Vallone opinion was improperly predicated on Bigbie v. Teamsters Local 142, 114 LRRM 2468 (N.D. Ill. 1983), where plaintiffs failed to even state a claim under LMRDA upon which relief could be granted. There was no injury, no damage and no standing. Additionally, the Seventh Circuit improperly relied on DelCostello and Metz v. Tootsie Roll, Inc., 715 F.2d 299 (7th Cir. 1983) cert. denied 464 U.S. 1070, 104 S. Ct. 976 (1984), to support the conclusion that LMRDA suits are subject to the same limitations applicable to hybrid Sec. 301/fair representation cases. DelCostello does not support this conclusion.

DelCostello, with its hybrid Sec. 301/fair representation claim presented "a direct challenge to the private settlement of disputes under the collective-bargaining agreement". 462 U.S. at 165, (quoting United States Parcel Service v. Mitchell, 451 U.S. 56, 66 (1981) (Stewart, J. concurring in judgment), quoting International Union, UAW v. Hoosier Cardinal, 383 U.S. 696, 702) (1966)). Therefore, this court applied section 10(b) NLRA limitations to achieve uniformity and stability.

It is certain that a challenge to the settlement of disputes under the collective bargaining agreement is not manifest in appellants' claim under Title I, LMRDA. The denial of voting rights in an internal union referendum is not within the purview of the grievance/arbitration/collective bargaining processes extant in external union labor relations.

As with Doty, "We draw the clear conclusion that Del-Costello is not the kind of precedent that lends itself as a springboard for easy application to other rights, statutes and policies. Rather, it is a closely reasoned exception to a general rule which illuminates a rather narrow path." 784 F.2d at 6.

The basis of this appeal is the charge of a denial of voting rights guaranteed by LMRDA Title I. Record, Document No. 2. Had the union properly notified the laid off appellants of the May 2, 1982 contract ratification meeting and permitted them to vote on the proposal for altering their layoff and recall seniority rights,[1] there would have been no cause of action.

The application of the Sec 10(b) time limitation to this cause of action is not supported by federal statute or Supreme Court doctrine.

The case here is first and foremost a pure, free standing LMRDA Title I cause of action with no dependancy or relationship to a hybrid Sec. 301/fair representation charge. The charge of a denial of voting rights stands on its own two feet. It could have been filed absent any Sec. 301/fair representation claim, and draws no support from that quarter.

In this case the denial of voting rights charged under LMRDA Title I precipitated the LMRA Sec. 301 charge. The internal union actions depriving appellants' voting rights affected the external economic circumstances of the appellants in that it altered their tenure of employment with a

[1] It is well settled in the Seventh Circuit that seniority is a property right. Nord v. Griffin, 86 F.2d 481 (7th Cir. 1936); Hunter v. Atchison T.&S.F. Ry. Co., 171 F.2d 594 (7th Cir. 1948), cert. denied, 337 U.S. 916 (1949).

diminution of their layoff and recall seniority rights. By no stretch of the imagination is this Title I charge an unfair labor practice as defined in the NLRA. Rather, it is a denial of voting rights in a union referendum, which is outside the scope of the grievance/arbitration procedures covered by the NLRA and LMRA. On that basis alone, the application of Sec. 10(b) time limitations to a pure, free standing LMRDA discrimination charge should be proscribed.

Two Circuit Courts of Appeals have read DelCostello as commanding the importing of the NLRA Sec. 10(b) six month time limitation into free standing LMRDA Title I cases. See Davis v. Local 970, 765 F.2d 1510 (11th Cir. 1985) cert. denied, 106 S.Ct. 1284 (1986); Local 1397 v. Steelworkers, 748 F.2d 180 (3rd Cir. 1984). In both cases the courts found that the union democracy internal claims under LMRDA Title I required the same time limitation as the external grievance/arbitration claims at stake in DelCostello.

The decision in Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986) is in direct conflict with Davis and Local 1397. In a well reasoned analysis of the legislative history behind LMRDA Doty reports that the "Congressional debate on LMRDA includes repeated references to Title I as a 'bill of rights' akin to that in our federal constitution, and the concern expressed was for individuals in relation to their 'government' ". 784 F.2d at 7. Doty goes on to say,

> We draw from this history the sense that claims under Title I's bill of rights were viewed primarily as civil rights matters. It was not coincident that Title I was labeled a 'bill of rights' and we believe it therefore more logical to apply a statute of limitations for pure Title I claims from a civil rights statute than from an unfair labor practices statute. Id. at 8.

The Doty court dissected and refuted the opinions in Davis and Local 1397. 784 F.2d at 19, 20-3. The court then proceeded to apply a limitations period from the Massachusetts three year statute of limitations for tort actions, stating,

> [O]ur foregoing discussion fully explains why we view an LMRDA Title I claim as analogous to a civil

> rights action. . . . Massachusetts does have a state civil rights act, . . . But, . . . no explicit statute of limitations . . . the appropriate limitations period . . . should be borrowed from state tort law. Traditionally, civil rights actions have been considered to state a cause of action in tort . . . .
>
> 784 F.2d at 11. (emphasis added)

Appellants here argue that the most analogous statute of limitations to be applied in this LMRDA Title I claim is Indiana Code Sec. 34-1-2-2 (1982 Ed.) providing a two year limitations period for actions in tort.[2] Indiana, as with Massachusetts, has a Civil Rights Act, but no explicit statute of limitations. Record, Statement of Plaintiffs-Appellants re Gibson v. AT&T Technologies, Inc., at 7-8.

As Doty recognized, there are circumstances "where LMRDA Title I claims have been appended to a classic 'hybrid' 301 suit to set aside an employer-union compromise on an economic issue where the union violated its duty of fair representation." 784 F.2d at 4, (citing Adkins v. International Union of Electrical Workers, 769 F.2d 330 (6th Cir. 1985); Vallone v. Teamsters Local 705, 755 F.2d 520 (7th Cir. 1984); and Linder v. Berge, 739 F.2d 686 (1st Cir. 1984)). Adkins, Vallone and Linder are not free standing LMRDA Title I cases. In fact, the Seventh Circuit chastised the appellants in Vallone for attempting to "twist the facts and distort the fundamental nature of their complaint" simply to escape the LMRA Sec. 301/fair representation, 10(b) statute of limitations. 755 F.2d at 523.

The difference between the case at hand and Adkins, Vallone and Linder is that the latters' LMRDA claims were predicated on their hybrid Sec. 301/fair representation claims

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2 This same statute of limitations is applied to Federal 1983 Civil Rights cases in Indiana. See, e.g., Bell v. Metropolitan School District of Shakamak, 582 F. Supp. 3 (S.D. Ind. 1983).

and were not free standing. This case presents precisely the opposite situation.[3]

The fact that the appellants charge Harvester as a party to the LMRDA claim should not go unnoticed. Appellee Harvester has maintained that it cannot be sued under LMRDA Title I and that such a suit is 'frivolous'. A suit under Title I of the LMRDA may not be brought against an employer exclusively. However, an employer may be a party to a suit brought against a union under LMRDA. Appellants' claim is that Harvester acted in collusion with the union to violate appellants' rights under LMRDA Title I. See Plaintiffs' Reply Brief at 2, 3.

Appellants are cognizant of this court's denial of a petition for a writ of certiorari in Davis v. UAW Local 970. Rather than accepting Harvester's statement that the denial of certiorari is tantamount to approval for the application of Sec. 10(b) to free standing LMRDA claims, appellants would look to the other side of the coin. Davis cannot be construed as this court's affirmation of the application of Sec. 10(b) to a bona fide LMRDA Title I suit. As with Vallone and Bigbie there are questions of standing in Davis. Close scrutiny reveals several unanswered questions that should preclude certiorari. The plaintiff in Davis suffered no injury. Furthermore, federal jurisdiction was questionable and the plaintiff may have purposely precipitated his alleged injury by violating protected procedure applicable to both parties.

The application of the Sec. 10(b) time limitation to a pure, free standing LMRDA cause of action is not supported by federal statute or Supreme Court doctrine.

The Seventh Circuit has here held that the petitioners' Fifth Amendment due process claim was properly denied, insofar as it lacked requisite governmental action by the

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3 The Seventh Circuit was properly apprised of Doty on March 20, 1986, with sixteen copies of the First Circuit's slip opinion dated February 10, 1986.

respondent unions. p. A-15, infra. Then the court presents an extensive string of case cites.

This Court has had occasion to consider when private persons or organizations are cloaked with sufficient governmental power to render their actions those of the government. This Court has specifically declared that even absent formal governmental involvement in the activities of private persons, it still may be that private actions are state actions. Marsh v. Alabama, 326 U.S. 501 (1946); Terry v. Adams, 345 U.S. 461 (1953). With these cases, as here, the private parties had the power to deprive constitutional rights, giving them powers equivalent to those of the government. Id. The purpose of cloaking certain private actions with state 'color' is to ensure that peoples' constitutional rights are not deprived without affording them recourse.

The Union's wilful failure to provide petitioners with notice in this case prevented petitioners from being aware their property rights were being legislatively altered by union governmental processes. The Union, acting under the authority granted by federal law, assumed the powers granted by Congress in the National Labor Relations Act. As noted by this Court in Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192 (1944), "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ." 323 U.S. at 202.

In this case, acting under the authority granted them by Congress, and the National Labor Relations Act, the union brought to a vote, absent over three hundred fifty (350) petitioners on layoff, a seniority adjustment which had the painful effect of destroying the petitioners' accrued seniority rights. This procedure lacked due process. The petitioners had a valuable property right, seniority, commanding constitutional protection. As the Seventh Circuit stated in Nord v. Griffin, 86 F.2d 481 (7th Cir. 1936) to deprive an employee of his seniority without due process is a "violation of his constitutional rights protected by the Fifth Amendment." at 482.

Seniority is to unionism what free speech is to the Bill of Rights in the United States Constitution. Without seniority there would be no union. It represents job security, the matrix of unionism.

Congress never intended labor unions to have the power to alter seniority rights of employees without due process of law. As Justice Douglas stated in his concurring opinion in International Association of Machinists v. Street, 367 U.S. 740 (1961), "Since neither Congress nor the state legislature can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them." 367 U.S. at 777.

The issue of constitutional liability in the public and private sectors was recently addressed by the Fourth Circuit in Beck v. Communication Workers of America, 776 F.2d 1187 (1985), aff'd on rehearing 800 F.2d 1280 (1986), cert. granted, 55 U.S.L.W. 3807 (1987). The Court stated, "The differences between public sector and private sector collective bargaining simply do not translate into deficiencies in First Amendment rights." 776 F.2d at 1225. (citing Abood v. Detroit Board of Education, 431 U.S. 209 at 232 (1977)). Beck was dealing with the rights of association, protected under the First Amendment, which were violated by the union's unwarranted use of agency shop fees for political purposes. The court's analysis went directly to the collective bargaining power acquired by the union through federal statute,

> Governmental involvement and governmental action in this case . . . is indisputable. The right of action herein has its roots in the National Labor policy embodied in the NLRA and Taft-Hartley Act and is a part of the legislated national labor policy, that according to the Supreme Court in NLRB v. Allis-Chalmers Mfg. Co. . . . 'extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all the employees.'

Beck, 776 F.2d at 1207. Plaintiffs' Reply Brief at 10.

The need to protect the individual employees from an arbitrary deprivation of their constitutional rights is heightened in the labor union setting. Harvester employees are required to belong to the union. They are then required to submit to the governing powers of the union leaders.

It would be a gross miscarriage of justice to allow the one-sided bargaining process and secret vote to permanently deprive the petitioners of their fundamental rights, and then shield the union from liability. The union is the sole bargaining representative of the petitioners, and they are unable to or be heard without the union. In this case, it is the union itself which deprived the petitioners the right to speak which deprivation resulted in a violation of the petitioners' Fifth Amendment rights.

> During the early stages of the drafting of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter LMRDA), the Senate Committee on Labor and Welfare reported, 'Under the National Labor Relations and Railway Labor Acts, the union which is the bargaining representative has power in conjunction with the employer to fix a man's wages, hours and conditions of employment . . . . The government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent.' S. Rep. No. 187, 86th Cong. 1st Sess. (1959) (see Legislative History of Labor-Management Reporting and Disclosure Act of 1959, USCCAN, Vol. 2, p. 2336). The Senate Committee is speaking to the Bill of Rights in the LMRDA and they include referendums on union business affairs such as contracts and seniority rights.
>
> Record, Document No. 31 at 3-4.

As the senior senator from Arkansas has said: "There is no reason why a union man should be required to leave the rights guaranteed to him by the Constitution of the United States at the door when he goes into a union meeting." Doty v. Sewall, 784 F.2d 8 (1st Cir. 1986), citing 105 Cong. Rec. 14, 193 (1959). (Representative Griffin speaking)

II.
THE COURT OF APPEALS HAS NOT RECOGNIZED GENUINE ISSUES OF FACT AND THE DOCTRINE OF FUNDAMENTAL ERROR.

Doty v. Sewall, 785 F.2d, 1 (1st Cir. 1986) states:

In most cases a Title I plaintiff will be a union member who, unlike many unfair labor practice claimants, has not lost his job but wishes to remain a member. To decide to sue one's co-workers and superiors who have much to do with one's future fate even if one is successful gives pause. Such a decision is not lightly taken; the pressures on such a plaintiff to collect facts, retain an attorney and reflect suggest the inappropriateness of a six month period.

785 F.2d at 9.

The record in this case discloses the following:

As a result, we have been informed that a petition is being circulated in the Indianapolis plant in an effort to rescind the Master Recall Agreement. We are also informed that those who are circulating the petition are also seeking financial contributions to support their effort.

The International Union, Harvester Council and Local 98 are not supporting this petition nor the request for money from employees to support an attorney to charge us with violating a part of the Master Agreement that was ratified by all of the members covered under the agreement. Our legal counsel advises that the issue has been before the appropriate courts and federal agencies who have upheld the contract and further, the union would, if forced in the courts on this issue, take the necessary steps to recover all costs to the International Union, Harvester Council and Local 98. Record, Document No. 2, Exhibit F-1, F-3, (signed by Bill Casstevens, Vice-President, UAW and Dallas Sells, Director,

Region 3-UAW). The above quotes from Doty and the Record depict how the stage was set at the outset of this case.

Normally, an employee is instantly aware of the perceived violation. It took those members who had some inkling that they had been damaged at the May 2, 1982 ratification meeting approximately a year to determine that they had actually suffered harm. Since there was no grievance/ arbitration procedure available to them, they were compelled to look to the International and Local 98 constitutions. However, this was virtually impossible because the union would not make International constitutions available to the appellant members.

When appellants were recalled to work late in 1982 and early 1983, their attempts to obtain copies of the UAW Constitution to determine the propriety of the ratification vote were frustrated at every turn by union officials and personnel employees at the Union's local office. (Plaintiffs' Opening Brief at 24 and 25). Fifteen affiants attest that they were unable to obtain copies of the UAW Constitution. Id.

The coalition of voiceless members who had been wronged by both union and management was non-existant until the first transferee came into their bargaining unit with full seniority and pre-empted local members junior to that transferee's seniority date. This first occurred on March 7, 1983. Prior to March 7, 1983 there is no evidence that any appellant employee would suffer injury. The Union assured them that it was highly unlikely they would ever be affected by "Master Recall", and that "Master Recall" was not a change but merely a reorganization of seniority rights. Id. This was patently false. Record, Transcript at 30 and 168.

DelCostello v. International Brotherhood of Teamsters, et al., 462 U.S. 151 (1983) is predicated on grievance/arbitration proceedings. In the present case neither of these remedial steps were available to appellants. Any advance information that they were subject to injury was stifled by lack of notice and denial of a vote on ratification.

The interplay between big business and big labor was very complicated and subtle in this instance. The secrecy of

negotiations, (Plaintiffs' Opening Brief at 35), and the fact that their own union officers did not protect their seniority surprised the appellants and initially threw them off balance. It took time for them to realize that their seniority had been bartered away to illegally provide jobs for transferees from other Harvester plants. This is one of the many genuine issues of fact in this case.

Negotiations between Harvester and the UAW International Union to deprive appellants of their local recall seniority rights were an illegal violation of "Master Agreement." Local seniority is governed by the UAW International Constitution, and the supplemental agreement between Harvester and Local 98. Id. at 15-16. There is no authorization in either document for negotiating company-wide seniority. Therefore, there exists a violation of the UAW International Constitution by the Union and violation of the Harvester-Local 98 supplemental contract by Harvester. Id. at 9. (Quoting I.C. Sec. 22-7-2-1 [Burns 1983]). See also NLRB v. Allis Chalmers Manufacturing Co. et al., 338 U.S. 182 (1976); Scofield v. NLRB, 394 U.S. 426 (1969). Additionally, the Local 98 Constitution (contract) was violated by the Union. (Plaintiffs' Opening Brief at 9).

The shining paradox in this case is the introduction into evidence by the appellants of Bryant v. International Union UAW, et al., Cause No. IP77-542-C (S.D. Ind. 1981), where Harvester and the Union argued and won the point that seniority is controlled by local agreement, not "Master Agreement." In light of that case the union was estopped here from placing control of seniority in "Master Agreement." (Plaintiffs' Opening Brief at 16).

The Union breached "Master Agreement" and the Local 98 supplemental agreement in collaboration with Harvester, using this breach as a bargaining chip to establish "Master Recall". Id. at 10. In sum, the Union breached four separate contracts and Harvester breached two of the four in collaboration with the union. Id. at 9-12. There was no avenue for private settlement. There was no party with whom plaintiffs could file a grievance. Given the hostility of the union

officers, there was no appeal to the union hierarchy. Record, Document No. 2, Exhibits C, E and F-1, 2, 3. It is the foregoing breach of contracts that persuaded the argument of application of the analogous Indiana Code Sec. 34-1-2-1.5 (2 years governing oral employment contracts) in the fashion of International Union, UAW v. Hoosier Cardinal, 383 U.S. 696 (1960). Again, there are genuine issues of fact.

The District Court held that the Sec. 10(b) statute of limitation begins to run when "the claimant discovers, or in the exercise of reasonable diligence should have discovered, the act or acts triggering the alleged violation." District Court's Opinion at A-16, (quoting Metz at 304, quoting Hungerford v. United States, 307 F.2d 99, 102 (9th Cir. 1962)). The lower court determined the time for discovery to be the ratification meeting of May 2, 1982. Appellants were not notified of the meeting and if they had been in attendance they would have been denied the right to vote on their own seniority.

The Seventh Circuit noted in the following quotation, "Causes of action based on entry into collective bargaining agreements accrue, and section 10(b) starts to run when the contract is signed." Quoting United Independent Flight Officers, Inc. v. United Air Lines, Inc., 756 F.2d 1262, 1273 (7th Cir. 1985). The foregoing is the other theory for determining when limitations begin to run provided there is no clear evidence of finality in a grievance or arbitration procedure. This procedure is not proposed in DelCostello.

The Hungerford, Metz, and Independent Flight Officers analogies do not fit the case here. In Independent Flight Officers, all members (including retired members) were constantly aware of the voting proceedings, via proper notification. Secret negotiations and lack of proper notice completely nullify the "discovery rule" espoused in Hungerford and Metz. (Plaintiffs'Opening Brief at 32-34). At best it is a geniune issue of material fact. There is no substantive evidence that proper notice or information was provided to

refute appellants' claim that they did not understand the impact of "Master Recall" until the first transferee displaced appellants on the plant-wide seniority list. Given the wide geographical distribution of appellants' homes and the lack of publicity it is remarkable that two or three laid-off members learned about the meeting. Further, they did not read about it in the news, but were informed by friends who were still employed.

Appellants rely on Mennonite Board of Missions v. Adams, 103 S. Ct. 2706 (1983) for the adoption of minimum standards for notice when a property right (such as seniority) may be altered by an entity or agency with the power to do so. (Plaintiffs' Reply Brief at 7). "Notice" in this case did not even approach the minimum standards established by this court.

Appellants here are caught in the crunch between "big labor" and "big industry". Their stand against the establishment should not diminish their rights. They have been denied the right to vote on a question concerning their property right, seniority, by a clever manipulation of labor-management proceedings and artful pleadings relying on inapplicable standards.

From the outset of this case appellants have been threatened and ridiculed by "big labor" and "big industry", while two hundred (200) of their claimed class of three hundred fifty (350) have lost their jobs to transferees from Harvester plants in other states.

The opinion of the lower court, upheld by the appeals court, that appellants should have known the potential harm of "Master Recall" at the time of the May 2, 1982 meeting or at any time after that and particularly before March 7, 1983 is unrealistic. The Court of Appeals states in their opinion, "within the relevant time period a reasonably diligent person should know the contents of the contract he is working under." Clift, et al. v. Harvester, et al., No. 85-1802 slip op. at 14 (7th Cir. May 6, 1987). (A-14). This sounds good, but there are important unanswered genuine issues of fact posited with that statement, beginning with "what is the relevant time

period?" and "what is a reasonably diligent person?", especially under shop law with hostile union officers. The society and culture that make up the law of the shop are not normally evident to writers of court opinions. The social climate for the appellants, while in the shop and during intra-union activities is a genuine and crucial issue of material fact when determining a reasonably diligent person in this instance.

As with Adkins v. General Motors Corp., 573 F.Supp. 1188 (S.D. Ohio 1983), the latest date on which the action could have accrued was ". . . defendants began to enforce those agreements (at the latest) in January of 1981 . . . . This 'enforcement' date should stand as the latest date upon which this action accrued." 573 F. Supp. 1194. In the present case, this is a genuine issue of fact which alone should have precluded summary judgment in favor of defendants.

The failure of defendants to plead and prove actual knowledge on the part of the plaintiffs at the time of the ratification vote compounds the genuine issue of material fact as to when the statute of limitation accrued. "As movants for summary judgment, GM and the UAW bear the burden of showing that everything in the record demonstrates that no issue of material fact exists . . . ." Benson v. General Motors Corp., 716 F.2d 862, 864 (4th Cir. 1983).

The mortal blow to appellants' cause was the lower court's ruling, after the fact, that plaintiffs' motion for determination of a class was moot. This was pointed out to the court of appeals as an issue. The court of appeals considered appellants' presentation of the issue on federal civil procedure to be unqualified argument. No. 85-1802 slip op. at 5. (A-6). If the court of appeals is correct in disqualifying appellants' challenge of the procedure on the mootness ruling, the court is then faced with fundamental error. This requires review of appellants' cause of action, whether assigned as error or not, where justice of the case seems to require it. See Black's Law Dictionary at 638 (1968 ed.) However, the circuit court disregarded this "Hobson's Choice" and delivered the "coup de grace" to appellants with a declaration that all sworn

affidavits of appellants (47 in total claiming all the points that establish genuine issues of material fact) irrelevant. Addressing the lower court's mootness ruling, the circuit court said, "The district court may have been incorrect when it determined that the class certification question was moot." No. 85-1802 slip op. at 5. (A-7). Prior to this observation they established jurisdiction sua sponte for the purpose of abolishing the class notwithstanding the fact that the district court may have been incorrect. Furthermore, the circuit court claims appellants did not "accurately state the facts" on the mootness question, but failed to identify the inaccuracies. Id.

It seems that sua sponte examination would call for even handed justice for a determination of the merits of both sides of the question, particularly where fundamental error is a factor.

A valid motion for determination by order that a class be maintained was properly and timely filed. Record, Document No. 9. The motion was not ruled upon while it was viable. This is an error of civil procedure, not a judicial prerogative.

Just as one lawyer may police the adherence of another to a statute of limitations, a higher court should police the lack of proper procedure in a lower court. This is particularly true when it is brought to the attention of the higher court and qualifies as fundamental error.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The questions here are vital to millions of union members. In passing the LMRDA Congress intended to protect those rights of union members that are basic to our U.S. Constitution. This Court has historically recognized such rights inviolate.

Petitioner requests that the conflict between circuit courts concerning the application of DelCostello be settled by this Court. Thereafter this entire matter should be remanded to the District Court for a proper determination of a class action and appropriate disposition after a full development of the facts.

Respectfully submitted,

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Counsel for Petitioners

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Appendix

IN THE

Supreme Court of the United States

October Term, 1986

DONALD JOSEPH CLIFT, On Behalf of Himself and All Others Similarly Situated,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AGRICULTURE & IMPLEMENT WORKERS OF AMERICA (UAW), et al.,

Respondents.

SHORT APPENDIX TO WRIT OF CERTIORARI

George Franklin Hinkle, Esq.
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Indianapolis, Indiana 46205
(317) 923-9273

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1802

DONALD JOSEPH CLIFT, et al.,

Plaintiffs-Appellants,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 83 C 1282 – **William E. Steckler,** *Judge.*

SUBMITTED FEBRUARY 18, 1987*–
DECIDED MAY 6, 1987

Before BAUER, Chief Judge, CUMMINGS and MANION, *Circuit Judges.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 34(f). All parties have filed statements concerning the necessity of oral argument. Upon consideration of those statements, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and records.

PER CURIAM. Four named plaintiffs brought a class action against their union and employer alleging violations of section 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. § 185, and sections 101 and 102 of the Labor-Management Reporting and Disclosure Act, 1955 (LMRA), 29 U.S.C. §§ 411 & 412. In a subsequent motion, they sought leave to add a claim that they were denied due process of law in violation of the Fifth Amendment. On defendants' motions for summary judgment, the district court held that the statutory claims were time-barred. The court denied leave to amend on the ground that no government action was involved. The court did not certify the class action because it found that question moot since all of the plaintiffs' claims were being dismissed. The district court entered judgment for the defendants and plaintiffs appeal. For the reasons below, we affirm.

I

Both the plaintiffs and the defendants moved for summary judgment. In addition to numerous affidavits, the parties provided transcripts of testimony from a two-day hearing on a preliminary injunction. For our purposes, though, a brief description of the facts will suffice. Where necessary, additional facts will be brought out in our discussion of the applicable law.

Plaintiffs are employed by International Harvester Company (Harvester) at its engine assembly plant in Indianapolis. They are members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Local 98 of the UAW.[1] In late 1981 and early 1982, the UAW and Harvester entered into early negotiations for possible concessions on a 1980 collective bargaining

[1] When referring to the International we will use the term "UAW." When referring to Local 98, we will use the term "Local." The term "Union" will be used when it is unnecessary to distinguish the International and Local.

agreement that was not to expire until October 1982. The reason for the early negotiations was Harvester's precarious financial condition. A tentative agreement was reached at the end of April 1982. At the time, plaintiffs, and the class of about 350 employees they sought to represent, were on layoff from the Indianapolis plant, most for more than six months. The Local was informed that a tentative agreement was possible and notices were distributed at the plant concerning a meeting on May 2 regarding the contract negotiations. As it turned out, that was a meeting to explain and vote on the tentative contract. The Local did not consider the laid-off employees to be members in good standing entitled to vote on the contract (an interpretation contested by plaintiffs), so no special notices were sent to the laid-off employees, although they were not excluded from attending. The local media was told of the meeting, but advance reporting of the meeting by the media was apparently minimal if at all.

The new contract was approved by the Local by a vote of 235 to 129. The contract was approved nationwide by a vote of 7086 to 3949 and went into effect on May 3, 1982. The only provision relevant to the present case is the creation of a Master Recall List. The new contract provided for the keeping of a national list, by seniority, of eligible persons on layoff. If a particular Harvester operation had no local employees on layoff, those on the Master List were eligible to fill any job openings. Once hired at a new operation, that person took his seniority from his prior bargaining unit with him and thus could have higher seniority than persons who had worked at that particular operation for a longer period of time. The parties disagree on whether or not this new provision was significantly different from the prior contract and on whether the revision could be made nationally in contrast to the 1980 contract which provided for local arrangements on individual plant closings.

At the May 2 ratification meeting, the Local members present were told about the provision for a Master Recall List, but were advised that it would probably not affect them because all the laid-off Local employees had first to be recalled and that did not appear likely. As it turned out, though, all

the laid-off employees at the Indianapolis plant were subsequently recalled. On March 7, 1983, the first of several hundred transferees began work at the Indianapolis plant and were placed on the seniority list above some of the employees who had worked at the Indianapolis plant prior to March 7.

On September 6, 1983, more than seventeen months after the contract ratification but just under six months after the first transferee arrived, plaintiffs filed a complaint in the district court. They complained that the Master Recall provision had been improperly ratified because of insufficient notice to laid-off employees, failure to allow the laid-off employees to vote, the secrecy of the negotiations, and the alleged misrepresentation that Master Recall would not affect employees at the Indianapolis plant. The claims were pursuant to the LMRA and LMRDA. After plaintiffs' preliminary injunction was denied, both sides moved for summary judgment. The district court held that a six-month statute of limitations applied and that the cause of action accrued in May 1982 when the new contract was ratified. Plaintiffs' claims were therefore time-barred and it was unnecessary for the court to consider other grounds for dismissal. The court also denied leave to add the Fifth Amendment due process claim because there was no government action that would bring that Amendment into play. The district court found the question of class certification to be moot. Judgment was entered for the defendants and plaintiffs appeal.

II

We first consider plaintiffs' "argument" that the district court has failed to rule on the question of certification of this action as a class action. Plaintiffs' entire "argument" on this issue consists of the following:

> III. THE DISTRICT COURT ERRED IN NOT GRANTING PLAINTIFFS' MOTION THAT A CLASS ACTION SUIT BE MAINTAINED.
>
> The Plaintiffs originally filed this action as a class action on September 6, 1983. Plaintiffs subsequently filed a "Motion For Determination By Order That a Class Action be Maintained" on December 5, 1983. In the year and

> nine months that has passed since its filing, the district court has failed to rule on this Motion.

Plaintiffs' Brief at 39.

This does not qualify as an argument; ordinarily, we would not consider the issue at all. See Bonds v. Coca-Cola Co., 806 F.2d 1324, 1328 (7th Cir. 1986), and the cases cited therein. See also Fed. R. App. P. 28(a)(4); Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit 41-42 (1984 ed.). But we cannot ignore this issue; if plaintiffs accurately characterized the facts, we might have no jurisdiction over the appeal. Compare Gomez v. Illinois State Board of Education, 811 F.2d 1030, 1034 n.1 (7th Cir. 1987); Glidden v. Chromalloy American Corp., 808 F.2d 621 (7th Cir. 1986). We must raise jurisdictional issues sua sponte, even if not raised by the parties. See Arch Mineral Corp. v. Director, OWCP, 798 F.2d 215, 217 (7th Cir. 1986). Plaintiffs, however, did not fully and accurately state the facts in their "argument" and an accurate portrayal of the posture of this case is necessary for a proper resolution of the case.

The present case is distinguishable from Glidden. In Glidden, the district court granted a summary judgment motion for the defendants and dismissed the complaint. With the parties' agreement, the district court declined to decide if the action should have been certified as a class action and the court expressly withheld reaching a decision on class certification until after an appeal of the grant of summary judgment was decided. See id., 808 F.2d at 623. We held that we had no appellate jurisdiction under 28 U.S.C. § 1291 because there was no final judgment. Id. at 628. There was no interlocutory appeal under 28 U.S.C. § 1292(b), id. at 623; no partial final judgment under Fed. R. Civ. P. 54(b), id. at 623-24; nor was there any implicit granting, denial, or withdrawal of the class certification issue, id. at 624-27. In contrast, in the case now before us, the district court made an express ruling on the question of class certification: the court ruled that the certification question was moot. This was not a ruling on the merits of the class certification question which is what plaintiffs apparently still desire, but it is still a ruling on the question. Since there has been a ruling declining to grant class certifica-

tion and the district court entered a judgment for the defendants, there is a final judgment which we have jurisdiction to review. Cf. Gomez, 811 F.2d at 1034 n.1.

The district court may have been incorrect when it determined that the class certification question was moot. Compare id.; Glidden, 808 F.2d at 627; Napier v. Gertrude, 542 F.2d 825, 827 (10th Cir. 1976), cert. denied, 429 U.S. 1049 (1977). But, since that issue has not been properly raised by the plaintiffs on appeal, we will not consider whether we should remand this case for a determination of the merits of the class certification question. Since we uphold the district court's decision on the statute of limitations issue, we also let stand the decision on the unargued (at the appellate level) issue of class certification. Cf. Gomez, 811 F.2d at 1034 n.1. Additionally, since the district court never certified this case as a class action, we treat this appeal as an appeal of the four named plaintiffs' individual claims. Cf. Simmons v. Drew, 716 F.2d 1160, 1161 (7th Cir. 1983); Case & Co. v. Board of Trade of City of Chicago, 523 F.2d 355, 360 (7th Cir. 1975); Roberts v. American Airlines, Inc., 526 F.2d 757, 762 (7th Cir. 1975), cert. denied, 425 U.S. 951 (1976); Lagorio v. Board of Trade of City of Chicago, 529 F.2d 1290, 1291 (7th Cir.), cert. denied, 426 U.S. 950 (1976). Cf. also Glidden, 808 F.2d at 624-27.

III

The provisions of the LMRA and LMRDA under which plaintiffs brought their claims do not have an express statute of limitations. Relying on DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) (LMRA), Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983), cert. denied, 464 U.S. 1070 (1984) (LMRA) and Vallone v. Local 705, International Brotherhood of Teamsters, 755 F.2d 520 (7th Cir. 1984) (per curiam) (LMRDA), the district court borrowed the six-month limitation period from section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b). Plaintiffs argue that the proper limitation period to borrow is the most analogous state limitation period, in particular the two-year period for oral contract claims under

Indiana law. See, e.g., International Union, United Automobile Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); International Union of Elevator Constructors v. Home Elevator Co., 798 F.2d 222 (7th Cir. 1986). Alternatively, plaintiffs argue that even if the six-month limit applies, the cause of action accrued when the first transferee arrived on March 7, 1983 and therefore the complaint was timely filed within the six-month period. We first consider which limitation period applies to this case.

A

In Hoosier, a union brought suit under § 301 of the LMRA for the employer's failure to pay accumulated vacation pay as required by the collective bargaining agreement between the union and employer. That action was "essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement. Such an action resembles an action for breach of contract cognizable at common law." 383 U.S. at 705 n.7. The Supreme Court decided that analogous state law should determine the appropriate statute of limitations, id. at 704-05, which in that case was Indiana's six-year period for claims in which the contract is not entirely in writing. Id. at 707. The Court expressly reserved its judgment as to whether other types of § 301 suits might require the application of different rules of timeliness. Id. at 705 n.7. Seventeen years later, the Court decided that in "hybrid" § 301 suits, involving both employer violations of the collective bargaining agreement and the union's failure to fairly represent the complaining employee, the appropriate limitation to borrow is the six-month limitation period for unfair labor practices found in § 10(b) of the NLRA. DelCostello, 462 U.S. at 155. Hoosier was distinguished as "a straightforward suit under § 301 of the [LMRA] for breach of a collective bargaining agreement by an employer. Unlike the present cases, Hoosier did not involve any agreement to submit disputes to arbitration, and the suit was brought by the union itself rather than by an individual employee." DelCostello, 462 U.S. at 162. Hoosier also did "not involve 'those consensual processes that federal labor law

is chiefly designed to promote--the formation of the collective agreement and the private settlement of disputes under it.' " DelCostello, 462 U.S. at 162-63 (quoting Hoosier, 383 U.S. at 702). Additionally, in Hoosier there was a closely analogous state cause of action. DelCostello, 462 U.S. at 163, 165. See also Home Elevator, 798 F.2d at 225-26 (comparing Hoosier and DelCostello). In a recent case, we held that Hoosier's approach of borrowing the most closely analogous state limitation period continues to be the general rule even after DelCostello. Home Elevator, 798 F.2d at 223. Plaintiffs argue that their claims are closer to the straightforward breach of contract claims of Hoosier and Home Elevator than to the hybrid claims of DelCostello[2] and therefore the appropriate limitations period is Indiana's two-year period for claims based on oral contracts.[3]

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2 We note that DelCostello is applied retroactively, so it does not matter that plaintiffs' claim accrued and became time-barred before DelCostello was decided. See Bonds, 806 F.2d at 1326.

3 In supplemental briefs, the parties discuss whether Gibson v. AT&T Technologies, Inc., 782 F.2d 686 (7th Cir.), cert. denied, 106 S.Ct. 3275 (1986), controls the decision in this case. Defendants argue that it does and plaintiffs take the opposite view. It is true that Gibson involves a fact situation somewhat similar to the case now before us. However, the principal issue in Gibson was whether federal labor law preempted a state law fraud claim regarding the employer's alleged misrepresentations concerning pension benefits under the collective bargaining agreement. We held that the state claim was preempted by federal law. Id. at 688. The plaintiffs in that case still could have made a claim under § 301, but it was barred by the applicable six-month statute of limitations. That case is not controlling because the parties apparently did not dispute that the six-month limitation period applied and therefore our opinion contains no discussion of why there is a six-month limitation period. See id. at 689. There is no argument in the present case that plaintiffs' claims are state law claims, not claims under federal labor law, so there is no preemption issue. Plaintiffs only argue that their federal claims are closely analogous to state breach of contract claims and therefore the state statute of limitations should be borrowed.

We do not find that plaintiffs' claims are merely straightforward breach of contract claims. It is not merely claimed that Harvester performed a breach by misapplying the collective bargaining agreement. Instead, it is claimed that Harvester and the Union improperly entered into a new contract. Harvester's alleged misconduct was primarily that it entered into a new agreement with persons not properly authorized to do so. (It is also alleged that Harvester improperly participated in secret negotiations.) That is not a straightforward breach of contract claim like Hoosier where the employer failed to pay accumulated vacation pay allegedly due to terminated employees under the collective bargaining agreement. See id., 383 U.S. at 698. Nor is it like Home Elevator, where the employer allegedly failed to pay the proper wage rate under the collective bargaining agreement. See id., 798 F.2d at 224. Instead, the present case involves the employer acting properly under the terms of a collective bargaining agreement with an allegation that the collective bargaining agreement is not the one to be followed. Also, like DelCostello, but unlike Hoosier and Home Elevator, this is a suit by individual employees against both the employer and the union, not a suit merely against the employer by the union.

Plaintiffs try to distinguish DelCostello because their case does not involve a grievance nor arbitration for which the Union failed to provide adequate representations. While it is true that this case does not involve "the private settlement of disputes under [the collective bargaining agreement]," which DelCostello involved, it does involve "the formation of the collective agreement"; both are "consensual processes that federal labor law is chiefly designed to promote." Hoosier, 383 U.S. at 702; DelCostello, 462 U.S. at 162-63. DelCostello cannot be distinguished simply because the Union's alleged improprieties arose during negotiations not during a grievance procedure. See United Independent Flight Officers, Inc. v.

United Air Lines, Inc., 756 F.2d 1262, 1270-71 (7th Cir. 1985).[4] Cf. Home Elevator, 787 F.2d at 228 n.5.

Additionally, we do not find a breach of contract claim to be closely analogous to the claims involved in the present suit. While it is possible that a state contract claim might involve questions of proper authority to enter into a contract, such contract questions are distinct from whether a union properly negotiated and ratified a contract under federal labor law. And the primary dispute in this case concerns whether the Union acted properly under federal laws controlling its decision-making processes. An unfair labor practice is a more closely analogous cause of action. See United, 756 F.2d at 1270-71. See also DelCostello, 462 U.S. at 170. Since this case involves a union's duties when negotiating a contract, an issue central to federal labor law, policy considerations favor a uniform statute of limitations. See United, 756 F.2d at 1271; DelCostello, 462 U.S. at 171. We therefore conclude that the appropriate statute of limitations to apply to the LMRA claims is the six-month limitation period found in § 10(b) of the NLRA.

Plaintiffs also argue that their LMRDA claims should not have been subjected to the six-month limitation period. We have previously decided that the reasoning in DelCostello applies equally to both LMRA § 301 claims and claims under sections 411 and 412 of the LMRDA. Vallone, 755 F.2d at 521-22. For the same reasons that we hold a six-month

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[4] Although United was decided under the Railway Labor Act, the relevant rules are no different than those applied under § 301 of the LMRA. See United, 756 at 1270.

limitation period to be applicable to plaintiffs' LMRA claims, we also hold that that period applies to the LMRDA claims.[5]

B

We have decided that the district court correctly determined that a six-month statute of limitations applies to plaintiffs' statutory claims. Plaintiffs still argue, however, that their claims were filed within the six-month period. Plaintiffs essentially make two distinct arguments by which their claims could be deemed to be timely. One is that the cause of action did not accrue until the problem actually was (or should have been) discovered. They argue discovery occurred when the transferees first arrived on March 7, 1983. The other argument is that the claim did not arise until the transferees arrived because that is when the injury first occurred, not when the contract was ratified. Both arguments fail.

The claims in this case concern the improper ratification of a collective bargaining agreement and the applicable statute of limitations is borrowed from § 10(b) of the NLRA. "Causes of action based on entry into collective bargaining agreements

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5 In their opening brief, plaintiffs conceded that Vallone was correctly decided, but argued that their particular LMRDA claim was not analogous to § 10(b) of the NLRA. In a supplemental brief, however, they appear to argue that the reasoning of DelCostello should not apply to LMRDA claims. They primarily rely on a recent case from the First Circuit, Doty v. Sewall, 784 F.2d 1 (1st Cir. 1986). Doty, however, only involved a claim by a union member that his union improperly denied his transfer of membership. That claim did not concern the bargaining process nor any grievance with Doty's employer. While Doty includes general language as to why claims under the LMRDA should be distinguished from claims under § 301 of the LMRA, the decision is expressly limited to its facts. See id. at 4-5, 9. Also, a number of circuits are in accord with the conclusion we reached in Vallone. See Adkins v. International Union of Electrical Workers, 769 F.2d 330, 335 (6th Cir. 1985); Davis v. United Automobile Workers, 765 F.2d 1510, 1514 (11th Cir. 1985), cert. denied, 106 S.Ct. 1284 (1986); Local 1397, United Steelworkers v. United Steelworkers, 748 F.2d 180, 184 (3d Cir. 1984). We will not reconsider our decision in Vallone applying DelCostello to claims under sections 411 and 412 of the LMRDA.

accrue, and section 10(b) starts to run, when the contract is signed." United, 756 F.2d at 1273. Accord Metz, 715 F.2d at 305; Local 1424, International Association of Machinists v. NLRB, 362 U.S. 411 (1960). The claim does not wait to accrue until the time at which the contested provisions of the agreement are enforced. Id. It is also true, though, that the "limitation period begins to run '. . . when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violations].' " Metz, 715 F.2d at 304 (quoting Hungerford v. United States, 307 F.2d 99, 102 (9th Cir. 1962)) (ellipsis and brackets in Metz). Accord Vallone, 755 F.2d at 522. Thus, plaintiffs' claims accrued when the collective bargaining agreement was entered into in May 1982, unless the existence of the new contract could not reasonably have been discovered until later and was not actually discovered by plaintiffs until later.

The discovery rule is an exception to the time-bar rules and plaintiffs bear the burden of proving they fell within the exception. See Adkins v. International Union of Electrical Workers, 769 F.2d 330, 335 (6th Cir. 1985); Crawford v. United States, 796 F.2d 924, 929 (7th Cir. 1986); Drazan v. United States, 762 F.2d 56, 60 (7th Cir. 1985); Hupp v. Gray, 500 F.2d 993, 996 (7th Cir. 1974). Plaintiffs make a number of citations to the record in an attempt to show that at least some members of the Union did not discover the cause of action until March 7, 1983. But, as discussed in Section II above, the class action was denied and not appealed, so only plaintiffs' individual claims remain on appeal. Therefore, each individual plaintiff can only succeed if it was shown that he personally met the discovery exception. The experiences of the other potential class members are irrelevant to the resolution of this issue on appeal.

Initially, we note that plaintiffs appear to argue that they had to have been sent notice that would have satisfied constitutional due process requirements regarding notices sent for lawsuits or administrative procedures before they could be considered to have actual, or even putative, knowledge that their cause of action accrued. To the extent plaintiffs are making such an argument, we reject it. The cause of action

accrued if they had knowledge through any means or if they should have known. Cf. Metz, 715 F.2d at 304; Mull v. Arco Durethene Plastics, Inc., 784 F.2d 284, 288 (7th Cir. 1986); Hupp, 500 F.2d at 996-97. Similarly, any failure on the part of the Union to follow its own notice procedures is irrelevant if plaintiffs had actual knowledge of or otherwise should have known of the new contract provision. The Union's notice procedure could only be relevant to the extent employees reasonably and detrimentally delayed seeking out information because they reasonably expected that the Union would have informed them of new contract revisions. Cf. Hupp, 500 F.2d at 997.

Although they did not attend the May 2 meeting, Donald Clift knew of the meeting in advance and Jesse Hatcher learned about it in the evening after the meeting had adjourned. Reasonable diligence would have enabled both of them to discover the existence and contents of the new agreement well before March 1983. Moreover, both were recalled in June 1982 and on September 15, 1982 copies of the new agreement were distributed to employees. Furthermore, Hatcher states in his affidavit that he learned about Master Recall when he was recalled in June 1982. Stanley Wilson's testimony shows he returned from recall on January 10, 1983 and immediately thereafter learned about Master Recall. Clift's, Hatcher's, and Wilson's claims clearly accrued more than six months before the suit was filed in September 1983.

The only other named plaintiff is Donald Romaine. He did not testify at the preliminary injunction hearing, but his affidavit was submitted by the plaintiffs. He received no advance notice of the May 2 meeting, but he did return from layoff in October 1982. He also states that "I had no opportunity to be aware of the impact of the Master Recall List on my personal seniority until Master Recall transferees began arriving at our plant in the spring and summer of 1983 and it became apparent that they were preempting me on the plant-wide seniority list." As we discussed above, transferees' effects on a plaintiff's seniority did not determine when the claims accrued; entry into the new agreement was the relevant event. Romaine's affidavit is silent regarding when he learned

of the existence of the new agreement. Romaine therefore failed to meet his burden of showing that he satisfied the discovery exception to the May 1982 accrual date. Cf. Bonds, 806 F.2d at 1328; Hupp, 500 F.2d at 996; Adkins, 769 F.2d at 335. Additionally, the affidavit shows that Romaine returned to work in October 1982. Where there is no evidence that the contents of the contract were kept hidden from him, within the relevant time period a reasonably diligent person should know the contents of the contract he is working under. Cf. Metz, 715 F.2d at 304. Furthermore, the record shows that the signing of the new agreement, including specific reference to the Master Recall List, was well publicized in the Indianapolis newspapers. If Romaine acted with reasonable diligence, he should have known of the existence and contents of the new agreement more than six months before this suit was filed.

The LMRA and LMRDA claims were time-barred for all four plaintiffs.

C

Plaintiffs also argue that the district court should have permitted them to amend their complaint to add a claim pursuant to the Fifth Amendment. The district court denied leave to amend on the ground that the claim lacked merit. We agree. Absent the requisite governmental action, there can be no claim for a denial of constitutional due process. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51, 354 (1974), Anderson v. National Railroad Passenger Corp., 754 F.2d 202, 204-05 (7th Cir. 1984) (per curiam); Price v. International Union, United Automobile Workers, 795 F.2d 1128, 1130-33 (2d Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3476 (U.S. Dec. 23, 1986) (No. 86-1055); Kolinske v. Lubbers, 712 F.2d 471, 474-80 (D.C. Cir. 1983). Compare Beck v. Communications Workers of America, 776 F.2d 1187 (1985), aff'd on other grounds, 800 F.2d 1280 (4th Cir. 1986) (en banc) (per curiam), petition for cert. filed, 55 U.S.L.W. 3317 (U.S. October 17, 1986) (No. 86-637), and 55 U.S.L.W. 3454 (U.S. Dec. 11, 1986) (No. 86-966).

IV

For the reasons given above, we affirm the judgment of the district court.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DONALD J. CLIFT, et al.	)	
	)	
v.	)	IP 83-1282-C
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.	)	

ORDER OF APRIL 9th, 1985

This matter is before the Court on motions for summary judgment filed by both defendants and on motions for leave to file an amended complaint and for determination by order that a class action be maintained filed by plaintiffs. Defendants oppose both of plaintiffs' motions. Having considered the motions, supporting and opposing briefs, affidavits and exhibits and the evidence and testimony admitted during the hearing on plaintiffs' motion for preliminary injunction, the Court finds that defendants' motions should be granted and that plaintiffs' motions should be denied.

This case is an action for injunctive relief and damages for alleged violation of the Labor Management Reporting and Disclosure Act of 1959 and the National Labor Relations Act. Plaintiffs are employees of defendant International Harvester Company (Harvester) at its engine assembly plant, 5565 Brookville Road, Indianapolis, and are members of the defendant unions (the International and Local 98). Plaintiffs allege that defendants have violated plaintiffs' voting rights under 29 U.S.C. § 411 by illegally ratifying a modification of the Master Bargaining Agreement concerning recall rights and seniority. Plaintiffs also allege that Harvester has breached the

collective bargaining agreement in violation of 29 U.S.C. § 185 and that the union has breached its duty of fair representation.

In April 1982, as part of a national agreement between Harvester and the United Auto Workers (UAW), a new transfer procedure was developed to provide for laid-off employees and those affected by plant closings due to Harvester's economic difficulties. Under the new method, a Master Recall List was compiled which included laid-off Harvester employees in certain categories throughout the Harvester system. All job openings in any Harvester plant are to be filled by the most senior, qualified employee on the Master Recall List. Employees transferred to a new operation because of a plant closing or partial closing retain their full seniority. This provision, along with the rest of the 1982 national agreement, was ratified by Local 98 on May 2, 1982.

Plaintiffs object to the Master Recall List and specifically the provisions allowing transferees to carry their full Harvester seniority to any new Harvester plant. Plaintiffs claim that they have lost seniority, which in turn affects their recall and lay-off rights, because transferees with more seniority are transferring to the Indianapolis plant and are displacing plaintiffs on the plant's seniority list. Plaintiffs allege that the Master Recall List substantially affected their seniority and recall rights by requiring Harvester to accept employees from other plants and by establishing seniority as a national issue instead of a local issue.

Plaintiffs also allege the 1982 ratification was illegal and therefore, the agreement is void. According to plaintiffs, approximately 350 employees who were laid off from the Indianapolis plant at the time of the May 2d vote were not allowed to attend the meeting or to vote on the new contract. Plaintiffs contend that these members were members in good standing and eligible to vote according to the Master Agreement, the International Constitution and By-Laws, and the National Labor Relations Act.

In response, defendants contend that the Master Recall List did not substantially affect plaintiffs' seniority rights, but rather was an administrative change to facilitate employee

transfers from closed Harvester plants to more prosperous Harvester plants. Defendants argue that the seniority provision under the Master Recall List has been part of the Master Bargaining Agreement since at least 1973. Defendants also contend that no employees were denied the right to attend the ratification meeting or denied the right to speak or ask questions and that no members, who were in good standing, were denied the right to vote on the new contract. Defendants argue that the union's good standing requirements are reasonable and comply with 29 U.S.C. § 411.

Defendants have raised several reasons for granting summary judgment. Harvester argues that there is no cause of action against an employer under 29 U.S.C. §§ 411 and 412, that plaintiffs' § 301 claim is barred by the six-month statute of limitations, and that plaintiffs failed to exhaust the intra-union procedures. The union argues that the action is barred by the statute of limitations, that the union's ratification procedure and voting requirements are reasonable and lawful and that the cause is moot because even if all 350 members of the proposed plaintiff class had voted against the 1982 contract, it still would have been ratified based on the national vote totals. The union also challenges the plaintiffs' interpretation of the prior contract provisions. Although the Court believes the evidence would support defendants' arguments on the merits, the Court finds that it need not address the merits of the case because the action is barred by the statute of limitations.

It is well established that hybrid § 301/ breach of duty of fair representation claims are subject to the six-month limitations period in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). DelCostello v. International Brotherhood of Teamsters, 103 S.Ct. 2281 (1983); Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299 (7th Cir. 1983). Recently the Seventh Circuit Court of Appeals has held that the six-month period also applies to claims brought under Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 411, 412. Vallone v. Local Union No. 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, No. 84-1014 (7th Cir. December 19,

1984). Here, Plaintiffs did not file the present action until September 6, 1983, well past the six-month time period.

However, plaintiffs argue that their complaint is timely even if the Court determines that the six-month limitation applies to this action because some of the plaintiffs did not know about the ratification meeting and none of them knew the truth about the Master Recall provision until the transferees began arriving at the Indianapolis plant in March 1983. Plaintiffs allege that defendants disguised the nature and extent of the contract changes and deceived the local membership when the Master Recall provision was explained at the ratification meeting.

The statute of limitations begins to run when "the claimant discovers, or in the exercise of reasonable diligence should have discovered," the act or acts triggering the alleged violation. Metz, 715 F.2d at 304. Despite plaintiffs' contentions, the Court finds that the Master Recall List was fully explained at the meeting held May 2, 1982 and that a majority of those voting ratified the contract. Both affidavits and testimony reveal that the union members were told about the Master Recall List and the seniority provision. Questions were raised regarding the effect on the local members' seniority if transferees were to come to Indianapolis. The members were told their seniority could be affected in that event, but that they would be able to carry their seniority with them in the event the Indianapolis plant closed and they transferred to another plant. Although the union leaders told the members that there probably would be little actual effect on the Indianapolis plant, the Court does not find that the union deceived the plaintiffs or made misrepresentations to them. There is no evidence that at the time the contract was ratified defendants knew the Indianapolis plant would be prosperous enough to be able to recall all of its laid-off employees, much less that it would have job openings for transferees. Thus, plaintiffs should have known the meaning of the Master Recall List as of May 2, 1982.

The evidence also shows that notice was given of the ratification meeting in a reasonable manner under the circumstances. Working under a very short deadline, the union dis-

tributed hand bills at the plant and notified the news media. Several of plaintiffs' affidavits indicate that members did learn about the meeting. Evidence also establishes that the new contract was reported in the local media and that a union member would have been able to determine when the ratification meeting was to be held. Thus, plaintiffs' argument that some of the proposed class members did not know about the meeting until they returned from lay-off is insufficient to toll the statute of limitations regarding the § 411 claim. Furthermore, the affidavit of Donald J. Clift, a named plaintiff in this action, establishes that he knew as of May 2, 1982 that he would not be allowed to vote. Therefore, any cause of action based on § 411 began to run as of that date.

Plaintiffs have moved for leave to file an amended complaint in order to assert a claim under the Fifth Amendment. Plaintiffs allege that they were denied a property right without due process and that there is sufficient government entanglement with the defendants under the national labor statutes to constitute the requisite government action for a Fifth Amendment claim. Plaintiffs contend that the government has transferred its power to the union through the national labor laws.

The Court finds no merit to plaintiffs' argument, and therefore denies leave to amend the complaint. Government regulation is insufficient to convert the actions of private entities into state action if the government is not responsible for or has not compelled the challenged conduct. Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). Although the national labor laws authorize a framework for employee organization and collective bargaining, the statutes do not mandate or compel the unions and employers to provide for specific contract provisions. Thus the negotiation of the seniority provisions does not constitute state action. See Kolinske v. Lubbers, 712 F.2d 471, 478 (D.C. Cir. 1983). The government also has not transferred traditional state functions to the union nor has it acted with the private parties in negotiating the contract. Therefore, there is no state action. Id.

The Union has requested attorney fees and costs expended in opposing plaintiffs' motion to amend pursuant to Fed. R. Civ. P. 11. Defendant argues that the motion is frivolous and cannot be supported by reasonable argument. Plaintiffs have requested that defendant's "reply brief," which requests attorney fees, be suppressed because the brief falls outside the briefing schedule outlined in Local Rule 9.

The Court finds that both requests should be denied. Although plaintiffs' argument in support of their motion to amend is not persuasive, the Court does not find it frivolous and concludes that it does not warrant the imposition of sanctions under Rule 11. Although defendant's reply brief is not within the briefing schedule in Local Rule 9, the Court notes that defendant has requested an extension of time in which to file its reply brief, which plaintiffs did not oppose and which the Court granted. The time to object to defendant's additional brief was at the time defendant requested the extension, not after the brief was filed. Furthermore, plaintiffs are not prejudiced by the reply brief. As plaintiffs point out, it merely sets forth reported case law. Defendant's brief does not attempt to submit additional evidence or insert additional issues into the controversy.

By reason of the foregoing the Court concludes that plaintiffs' claims are barred by the statute of limitations and that defendants are entitled to judgment as a matter of law. The Court also concludes that plaintiffs cannot state a cause of action under the Fifth Amendment and, consequently, their motion for leave to amend the complaint is DENIED. Because this action is being dismissed, plaintiffs' motion for class certification is moot.

THEREFORE, IT IS ORDERED that plaintiffs' motion for leave to amend complaint is DENIED.

IT IS FURTHER ORDERED that defendants' motions for summary judgment are GRANTED.

Dated this 9th day of April, 1985.

/s/ William E. Steckler
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DONALD J. CLIFT, et al.	)	
	)	
v.	)	IP 83-1282-C
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.	)	

JUDGMENT

The defendants having moved for summary judgment in this cause, and the Court having determined that there is no genuine issue of material fact, and having issued its order of this date which is as follows:

(H.I.)

IT IS NOW ORDERED, ADJUDGED and DECREED that judgment be entered for defendants International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 3, UAW, and Local 98, UAW, and International Harvester Company, and that plaintiffs take nothing by way of their complaint and that said complaint is DISMISSED.

Dated this 9th day of April, 1985.

/s/ William E. Steckler
United States District Judge

Supreme Court, U.S.
FILED
AUG 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD JOSEPH CLIFT, *et al.*,
Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the six-month statute of limitations in Section 10(b) of the Labor Management Relations Act, which is applied to employees' hybrid Section 301/duty of fair representation claims, the appropriate statute of limitations for related employee claims under the Labor Management Reporting and Disclosure Act (LMRDA) for breach of union membership rights during ratification of a collective bargaining agreement?

2. Does the application of the six-month limitation period to LMRDA claims of this kind violate any civil rights of union members guaranteed by federal labor law or the fifth amendment of the Constitution?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-42

DONALD JOSEPH CLIFT, *et al.*,
Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

STATUTES INVOLVED

The competing statutes of limitation considered by the Seventh Circuit are Section 10(b) of the Labor Management Relations Act, 29 U.S.C. Section 160(b), and Indiana Code 34-1-2-1.5.

29 U.S.C. Section 160(b) provides in relevant part:

Provided . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the

service of a copy thereof upon the person against whom such charge is made.

Ind. Code 34-1-2-1.5 provides:

All actions relating to the terms, conditions, and privileges of employment except actions based upon a written contract (including, but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement wages, or salary) shall be brought within two years of the date of the act or omission complained of.

STATEMENT OF THE CASE

Petitioners are four employees of Navistar (formerly International Harvester) at its assembly plant in Indianapolis, Indiana. They are represented for purposes of collective bargaining by Local 98 and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. On September 6, 1983, petitioners filed a federal class action suit against Navistar and Local 98, Region 3 and the International Union, UAW, broadly challenging the Master Recall provision adopted on May 3, 1982, as part of the UAW-Navistar national agreement.[1] (Record, at 2.)[2] Under the Master Recall provision, employees with seniority in a Navistar plant that is closed in whole or in part are placed

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[1] Although styled as a class action, the class was never certified in the district court. The Seventh Circuit ruled that the plaintiffs' brief was inadequate to preserve their objections to the court's failure to certify the class. The questions presented in their pending petition to this Court are not addressed to this aspect of the lower courts' decisions.

[2] Reference to the Record are to the page numbers in the record prepared for the Seventh Circuit. (Hereafter, designated R., ——). References to the Transcript are to the Transcript of the Preliminary Injunction Hearing on December 14 and 15, 1983, which was a separately bound part of the Seventh Circuit record. (Hereafter designated Tr. ——).

on a Master Recall List.[3] Navistar is required to fill job openings in its other UAW plants with employees off the Master Recall List. Employees who transfer to other plants under this procedure are entitled to carry with them their full accumulated seniority. (R.21). Prior national agreements, going back to 1961 had also permitted employees to transfer with seniority in plant closing situations. (R.21). The effect of the Master Recall provision was to systematize the procedure for transfer to surviving Navistar locations. (Tr. 219, 159-60).

Petitioners were among three hundred and fifty (350) employees on layoff from the Indianapolis assembly plant when the Master Recall language was negotiated and ratified by the union membership.[4] The ratification vote for Indianapolis Local 98 was held on May 2, 1982. Notice was provided through postings and handbilling at the Navistar plant and by publicity in local newspapers and on radio and television. (R.22; Tr. 192, 203-204; R.28). In spite of these efforts, many laid-off members

---

[3] The Master Recall provision of the 1982 agreement provides in relevant part:

> The most senior qualified employee on the Master Recall List will be offered placement on open jobs at the respective Company operation after all qualified employees at that operation have been recalled from layoff.
>
> Once an employee on the Master Recall List, as a result of a Plant or Partial Plant Closing, has been placed at a Company operation on an open job, the employee will carry his/her company service and previous bargaining unit seniority to the new bargaining unit. The employee's racial and seniority rights at the home operation will be terminated.

(R.21)

[4] Under the UAW Constitution, membership ratification of all collective bargaining agreements is required. (R.23). Where a national agreement is involved, the votes of members in all locals to be covered by the agreement are pooled, and the majority vote of the membership as a whole determines whthr a contract is ratifid. (R.21 and 23).

did not receive notice of the ratification meeting. (R.25). All who learned of the meeting were permitted to attend and participate in discussion of the agreement. (R.22, R.25; Tr. 59, 111-112). At the meeting, the language of the Master Recall provision was read to the membership and was accurately summarized in a hand-out. (R.22, Tr. 19, 22, 29).

In accordance with the provisions of the UAW Constitution, employees who had been laid off for more than six months and who had not tendered dues or applied for out of work credit were not members-in-good-standing entitled to vote on ratification.[5] Because petitioners had been on lay-off for more than six months and had not paid dues or applied for out-of-work credit, they could not vote at the ratification meeting. UAW members nationwide who voted on ratification approved the agreement by a substantial margin.[6] The agreement took effect on May 3, 1982. It was printed and distributed to employees at the Indianapolis plant on September 15, 1982. (R.22).

Following adoption of the 1982 agreement, work at the Indianapolis plant expanded and by March, 1983, all laid-

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[5] Under Article 16 of the UAW Constitution, a UAW member remains in good standing as long as his dues and assessments are paid up and he has not been subjected to discipline or taken a voluntary withdrawal. (UAW Constitution, Art. 16, Sections 8, 10, 18-19; R.23). A UAW member on lay-off automatically retains his good-standing for the first six months of his layoff because, under Article 16, Section 18, a laid-off employee is granted a six months' out-of-work credit which excuses his duty to pay dues. After the six month period an employee is no longer automatically in good standing. R.23, Art. 16, Section 19). To remain in good standing after the six-month period expires, the member must demonstrate continued interest in the union either by the payment of dues or by filing a written certification for out-of-work credits to excuse the dues-paying requirement.

[6] The UAW membership nationwide ratified the 1982 Navistar agreement by a vote of 7086 to 3949.

off employees had been recalled.[7] After that time, the company filled openings in the plant with employees from the Master Recall List. These new employees were credited with their full previous seniority earned at other Navistar plants. As a result, they now hold higher positions on the plant seniority list than petitioners.

Petitioners' complaint was filed on September 6, 1983, sixteen months after adoption of Master Recall. In their complaint, they alleged that the manner in which the Master Recall provision was negotiated, ratified and adopted violated the provisions of the Labor Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. Sections 411(a)(1) and (2), and the National Labor Relations Act, 28 U.S.C. Section 185, *et seq.*[8] According to plaintiffs, as a result of the adoption of this proposal, their contractual layoff and recall rights, job bidding and job preference rights have been "substantially diluted." As a remedy, they requested an injunction against application of the Master Recall language and a return to the *status quo ante* in effect prior to ratification of Master Recall. In addition, they seek actual and punitive damages for losses attributable to the implementation of the Master Recall provision.

The district court entered summary judgment in favor of Navistar and the union defendants. The court ruled in an unpublished decision that plaintiffs' action was barred by the six month statute of limitations contained in 29 U.S.C. Section 160(b). The court also ruled that plaintiffs could not amend their complaint to add allegations of violations of the United States Constitution because the union's conduct in this case did not amount to

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[7] Plaintiffs Clift and Hatcher were recalled in June, 1982. Plaintiff Romaine was recalled in October, 1982. Plaintiff Wilson was recalled on January 10, 1983. (See Opinion of Seventh Circuit, Petitioners, Appendix, at A-14).

[8] A copy of plaintiffs' amended complaint is included as an appendix to this brief.

state action. (Petitioners App., A-21). On appeal, the Seventh Circuit affirmed. *Clift v. International Union, UAW*, 818 F.2d 623 (7th Cir. 1987).

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit's Application Of The Six-Month Statute Of Limitations In This Case Is Not In Conflict With The Decisions Of Other Circuits

This Court held in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), that the most analogous statute of limitations for cases involving employee claims against their employer and union in a hybrid Section 301 duty of fair representation action is the six-month period contained in Section 10(b) of the Labor Management Relations Act, 29 U.S.C. Section 160(b). While reasserting its ordinary practice of borrowing analogous state statutes of limitations for federal actions, the Court departed from that practice in favor of a federal statute of limitations designed to accommodate a balance of interests "very similar to the interests at stake in a Section 301/ duty of fair representation action." The six-month period was found to strike the proper balance between employee interests in avoiding arbitrary or discriminatory action by union representatives and the strong competing interest in stability in collective bargaining matters.

The Seventh Circuit found that a similar balance was implicated in this case where employees claim that the union improperly adopted, ratified and implemented a provision of the collective bargaining agreement and seek to have that agreement retroactively undone. Petitioners' single-count, amended complaint set forth one course of conduct which petitioners alleged violated both the union's duty of fair representation and the LMRDA "bill of rights." Under these circumstances, the Seventh Circuit applied the reasoning of *DelCostello* to invoke the six-month statute of limitations for plaintiffs' claims under both statutes.

This decision is not in conflict with the First Circuit's decision in *Doty v. Sewall*, 784 F.2d 1 (1st Cir. 1986). The *Doty* plaintiff claimed that the Teamsters had denied him union membership because of his active opposition to the union's actions. This conduct was alleged to violate the "bill of rights" for union members contained in Title I of the LMRDA, 29 U.S.C. Section 411-412. No claims relating to employment rights or to interpretation or enforcement of a collective bargaining agreement were asserted. The First Circuit concluded that the balance of interests in a free-standing LMRDA bill of rights claim is more analogous to a state civil rights action than to the Section 301/duty of fair representation action involved in *DelCostello*. Accordingly it declined to apply *DelCostello's* six-month statute of limitations and instead adopted the three-year state tort statute which had been applied in other civil rights actions.

However, the First Circuit in *Doty* expressly declined to decide "whether and under what circumstances an LMRDA claim also involving union and employer action relating to employment can be the subject of suit filed beyond the six months period." 784 F.2d at 4-5. In this context, the *Doty* court left undisturbed its earlier decision in *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984), which applied to *DelCostello* six-month statute of limitations to an LMRDA claim joined with claims involving the plaintiff's employment rights under a collective bargaining agreement.[9] Thus the court below properly concluded that the *Doty* decision was limited to its facts and that the facts in this case are distinguishable.[10] (Petitioners' App., A-12 n.5).

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[9] The court in *Doty* also distinguished the Seventh Circuit's decision in *Vallone v. Local 705, Teamsters*, 755 F.2d 520 (7th Cir. 1984), in which the court first applied the six-month statute to a combined LMRDA and duty of fair representation case.

[10] Similarly, the Second Circuit's recent decision in *Rodonich v. Laborers Local 95*, 817 F.2d 967, 125 LRRM 2578 (2d Cir. 1987),

All five of the Circuits to decide the LMRDA limitations issue since *DelCostello*, have applied the § 10(b) period to actions arising under the LMRDA and which also involved claims relating to employment rights. *Clift v. International Union, UAW*, 818 F.2d 623 (9th Cir. 1987); *Local 1397 v. Steelworkers*, 748 F.2d 180 (3rd Cir. 1984); *Linder v. Berge*, 739 F.2d 686, 690 (1st Cir. 1984); *Vallone v. Teamsters*, 755 F.2d 520 (7th Cir. 1984); *Adkins v. International Union of Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985). See also, *Miller v. Jeep Corp.*, 774 F.2d 111, 114 n.2 (6th Cir. 1985). No Court of Appeals has reached a contrary conclusion.

Here petitioners cannot be said to present a "free-standing" LMRDA claim entitled to the longer statute of limitations in *Doty*. The principal reason for adopting the relatively short six-month statute of limitations in *DelCostello* was to protect stability in the enforcement of collective bargaining agreements. Petitioner's action, rather than presenting a pure "bill of rights" claim, attacks the manner in which the UAW-Navistar national agreement was negotiated, adopted and enforced. It seeks to undo a collective bargaining provision which has been in effect since 1961, which has governed the transfer of hundreds of laid-off employees to surviving Navistar plants in other locations, and which has settled seniority rights for Navistar employees nationwide.

There is nothing in the *Doty* decision, or the decision of any other circuit, which suggests that the Seventh Circuit's decision to apply the *DelCostello* six-month statute of limitations in this case is unwarranted. Contrary to plaintiffs' assertion, the decision of the Seventh Circuit

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is factually distinguishable. That case involved internal discipline of union officers; no employment rights were at stake. *Rodonovich* merely follows *Doty* in applying a longer state statute of limitations in cases where the LMRDA rights do not relate to collective bargaining issues.

is not in conflict, either actually or in principle, with the decision of any other federal circuit. As this is the only substantial basis for granting the writ set forth in the petition in this case, the petition for a writ of certiorari should be denied.

II. The Petition Fails To Present Any Question Of Sufficient Importance To Justify Granting The Writ Of Certiorari Under Supreme Court Rule 17

Petitioners' second argument in support of their petition asserts "genuine issues of fact" and "fundamental error" in the Seventh Circuit opinion. This argument fails to frame an issue worthy of this Court's consideration under its own Rule 17. Moreover, the argument addresses the merits of petitioners' underlying claim, which have never been considered or ruled on by the courts below.

It is unclear from the petition whether petitioners seek to contest in this Court the rulings below that they do not have a cause of action for violation of their rights under the fifth amendment of the United States Constitution. (Petitioners' App., A-15, A-21). The petitioners' second Question Presented refers to rights guaranteed by the Constitution, but does so in the context of application of the statute of limitations. Argument on the issue is briefly included in the argument on the appropriate statute of limitations. (Petition, at 14-17). Under Supreme Court Rule 21.5, such as oblique reference to the constitutional issue is insufficient to present it for this Court's consideration.

Moreover, the constitutional issue, even if properly raised, is not a substantial one. Petitioners asserted below that the union's negotiation, ratification and adoption of the Master Recall provision deprived them of property rights in their seniority without due process. With this allegation, they seek to raise a constitutional claim. However, a union's discharge of its collective bar-

gaining functions would be subject to constitutional scrutiny only if it were "conduct fairly attributable" to state or federal government. *Lugar v. Edmondson Oil Co. Inc.*, 457 U.S. 922, 937 (1982). The primary focus on applying this standard is on the nexus between the challenged action of the defendant and the state's relationship to the defendant and involvement in the particular action. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). The nexus requirement is designed

> to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which plaintiff complains. [Emphasis in original]

Blum, 457 U.S. at 1004.

This Court has expressly rejected the claim that the negotiation of seniority provisions is subject to review under constitutional principles. In *United Steelworkers v. Weber*, 443 U.S. 193, 200 (1979), the Court stated that the collectively bargained affirmative action plan that impaired the seniority of white union members "does not involve state action." Similarly, in *United Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982), the Court dismissed for lack of state action the claim that a union rule prohibiting non-member contributions in union elections violated the first amendment.

The seniority rights which petitioners assert here are contractual rights not constitutional rights. It is left entirely to the negotiating parties to decide whether to provide for seniority and to determine the manner of its calculation and the manner in which it is extinguished. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). No state action is involved in the private negotiation of collective bargaining agreements.

For this reason, petitioners are mistaken in relying on the decision in *Beck v. Communication Workers of*

America, 776 F.2d 1187 (4th Cir. 1985), *aff'd on rehearing en banc*, 800 F.2d 1280 (1986), *cert. granted*, 55 U.S.L.W. 3807 (1987). The Fourth Circuit's *en banc* decision in *Beck* held that there was federal jurisdiction over a challenge to the union's use of agency shop fees for matters not directly related to collective bargaining.[11] Two judges of that court concluded that a union's collection of agency shop fees, as expressly authorized by federal and state law, implicates first amendment concerns where individuals assert that these mandatory assessments are being exacted to pay for political activities which they do not support. Five judges disagreed with this proposition; three did not find it necessary to reach the constitutional question.[12]

The issue in *Beck* is not the issue in this case. *Beck* implicated first amendment concerns which are not present here. *Compare Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. ——, 106 S.Ct. 1066 (1986); *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). Even the panel opinion which found state action in *Beck* recognized that all union collective bargaining conduct does *not* raise constitutional questions, noting the Supreme Court's decision in *United Steelworkers v. Weber, supra.* As the *Beck* court observed, in *Weber*, as in this case, the collectively bargained provision at stake "was purely voluntary, based on no statutory or

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[11] Five judges concluded that federal jurisdiction lay under Section 8(a)(3) of the LMRA, 29 U.S.C. Section 158(a)(3), and under the federal common law duty of fair representation. A sixth judge found jurisdiction only over the duty of fair representation claims. Four judges dissented from the finding of federal jurisdiction.

[12] Other circuits have held that, even in this narrow context, union action is not state action. *Price v. UAW*, 795 F.2d 1128 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3593 (U.S. Dec. 23, 1986) (No. 86-1055); *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983).

regulatory authorization." 776 F.2d at 1209. *See also Hovan v. United Brotherhood of Carpenters*, 704 F.2d 641, 642-643 (1st Cir. 1983).

Except in the traditionally sensitive area of union expenditure of mandatory assessments on political concerns not shared by dissenting employees, no court has suggested that the regular collective bargaining activities of labor unions amount to state action. Union conduct in this area is already limited by the judicially created duty of fair representation and the congressionally created duties imposed by the LMRA, 29 U.S.C. Section 158(b) and by the LMRDA, 29 U.S.C. Section 411.[13] No purpose could be served by imposing an additional layer of amorphous constitutional regulation on the collective bargaining process.

Petitioners' attempt to import constitutional standards into what is essentially a collective bargaining dispute has no basis in Supreme Court precedent or in decisions of the lower courts. Accordingly, it does not present a substantial issue for this Court's consideration. To the extent this issue is preserved in the petition in this csae, the petition should be denied.

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[13] As the First Circuit observed in *Hovan:*

> A 'govermnental action' finding also would constitutionalize' many of the statutory provisions of the [LMRDA], particularly those contained in its Bill of Rights.' Doing so might come as a surprise to Congress, which thought the statute necessary to impose the obligations it contains, and it would "freeze" those obligations, making modification or revision in light of experience difficult if not impossible. [Citations omitted]

704 F.2d at 643.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to the Seventh Circuit should be denied.

Respectfully submitted,

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No. 87-42

In The
Supreme Court of the United States
October Term, 1987

DONALD JOSEPH CLIFT; JESSE O'NEIL HATCHER; STANLEY BOYD WILSON, JR.; and DONALD W. ROMAINE, on behalf of themselves and all others similarly situated,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW); REGION 3, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW); LOCAL 98, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW); AND NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT NAVISTAR INTERNATIONAL TRANSPORTATION CORP. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioners' complaint against Respondent, Navistar International Transportation Corp., is cognizable under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411 and 412 (hereinafter "LMRDA") where said Petitioners are individual employees of Respondent, represented by the Respondent UAW, and where said Petitioners protest the negotation, ratification and adoption of a provision in the collective bargaining agreement.

II. Whether the Seventh Circuit departed from judicial precedent in holding that Petitioners' asserted causes of action under the LMRDA and under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185 (hereinafter "Section 301") were time barred, pursuant to a six-month statute of limitations, where Petitioners filed their complaint more than sixteen months after the protested contract provision was ratified and became part of the collective bargaining agreement.

III. Whether Petitioners' complaint against Respondent, Navistar International Transportation Corp., is cognizable under the Fifth Amendment of the Constitution of the United States where Petitioners protest the negotiation, ratification, and adoption of a provision in the collective bargaining agreement.

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OPINION BELOW

Respondent adopts the statement of the Opinion Below set out in the Petition for Writ of Certiorari.

—o—

JURISDICTION

Respondent adopts the statement of this Court's jurisdiction set out in the Petition for Writ of Certiorari.

—o—

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved in this case is the Fifth Amendment to the Constitution of the United States, set forth in the Appendix to this Brief.

The statutes involved in this case are the Labor Management Relations Act, 29 U.S.C. § 185 [Section 301]; the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(1) and (2), § 411(4), and § 412 [LMRDA]; and the National Labor Relations Act, 29 U.S.C. § 160(b) [Section 10(b)], each of which is set forth in the Appendix to this Brief.

—o—

STATEMENT OF THE CASE

I. Nature Of The Case

Petitioners' complaint protests the ratification and implementation of amendments negotiated in May, 1982, to the Collective Bargaining Agreement between Inter-

national Harvester Company (hereinafter "Navistar")[1] and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (hereinafter "UAW" or "Union") and its Region 3 and Local 98 affiliates. Petitioners complain that they were denied the right to speak and/or vote at the Union ratification meeting held on May 2, 1982. They also assert that the ratification of the amendments to the Collective Bargaining Agreement violated their rights under the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. § 411(a)(1) and (2), 29 U.S.C. § 412, (hereinafter "LMRDA"), Section 301 of the National Labor Relations Act, as amended, 29 U.S.C. § 185 *et seq.*, (hereinafter "Section 301"), and the Fifth Amendment to the Constitution of the United States.

II. District Court And Appeals Court Proceedings

Petitioners filed their Complaint in the District Court on September 6, 1983. On October 25, 1983, they filed their Amended Class Action Complaint For Injunctive Relief And Damages.

On November 8, 1983, Navistar filed its Motion For Summary Judgment. Approximately one month later, on December 14 and 15, 1983, the District Court heard evidence on Petitioners' Motion for a Preliminary Injunction.

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[1] Respondent Navistar has, since this action was filed, changed the name of its corporation to Navistar International Transportation Corp. Pursuant to Rule 28.1, Respondent Navistar hereby advises this Court of its subsidiaries: Mahindra & Mahindra Pty. Ltd. (India); Turk Otomotin Endustrileri (Turkey); and IDEAL (Brazil).

At the close of Petitioners' case, Navistar and Union Respondents moved that the request for preliminary injunctive relief be denied. The District Court denied Petitioners' Motion, finding that they failed to satisfy the standards governing the granting of preliminary injunctive relief. A motion for summary judgment was filed by the Union Respondents on March 8, 1984.

The district court entered summary judgment in favor of Respondents as to all issues on April 9, 1985. Petitioners thereafter filed on appeal to the Court of Appeals for the Seventh Circuit [hereinafter the "Seventh Circuit."]

The Seventh Circuit determined that oral argument would not be helpful to it in deciding the case. On May 6, 1987, the court of appeals affirmed the judgment of the district court. *Clift, et al. v. UAW, et al.*, 818 F.2d 623 (7th Cir. 1987).

III. Statement Of The Facts

Navistar concurs in and adopts the Respondent Unions' Statement of the Case, as set forth in the Union Respondents' Brief in Opposition to the Petition for Writ of Certiorari. Respondent Navistar provides the following as a brief factual statement.

Navistar operates an engine assembly plant in Indianapolis, Indiana. Petitioners are members of Respondent UAW and its Region 3 and Local 98 affiliates. Navistar and the UAW were parties to a collective bargaining agreement, effective May 2, 1980, that established all of the terms and conditions of Petitioners' employment with

Navistar at all times relevant hereto (hereinafter "1980 Agreement").[2]

In early 1982, Navistar and the Union entered into negotiations to supplement and revise the 1980 Agreement. These negotiations concluded by early May, 1982 and resulted in amendments and agreements, designated as "Supplemental Letters of Understanding," to the transfer provisions of Article XVI, Section 6(e) of the 1980 Agreement. These amendments and agreements are alleged by Petitioners to have altered the layoff and recall rights of members of the Union who were on layoff on May 2, 1982 by requiring the transfer with full seniority rights of employees from other Navistar plants to the Navistar facility in Indianapolis.

The 1982 amendment to Article XVI of the 1980 Agreement permits members of the Union from closed or partially closed Navistar plants to carry their full seniority with them when hired in another UAW-represented Navistar plant. During the negotiations which resulted in the amendments to Article XVI on May 2, 1982, the parties established an orderly procedure to transfer laid off union members from Navistar throughout the chain of Navistar plants, including those employees who were not involved in plant closings or partial closings.

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[2] In 1973, Navistar and the Union negotiated a collective bargaining agreement that provided that if a laid off Navistar employee was hired at another UAW-represented Navistar plant, such employee would be a probationary employee for one month and that, thereafter, his seniority would date back to his seniority date in the bargaining-unit in which he had the earliest seniority date. This applied to employees from closed Navistar plants.

On or about May 2, 1982, the amendments to the 1980 Agreement negotiated by Navistar and the Union were ratified by members of the Union. Among the ratified Navistar amendments was the above-described amendment to Article XVI. Petitioners allege that they were denied the right to speak and/or vote at the meeting held on May 2, 1982.

SUMMARY OF ARGUMENT

Petitioners' cause of action against Navistar under the LMRDA is misplaced. Although the Seventh Circuit found it unnecessary to consider the merits of said action, it is well-established that the LMRDA provides individual union members a right of action against unions only and that, as a matter of law, no relief can be secured against an employer. Moreover, Petitioners' cause of action under the LMRDA was properly dismissed by the courts below because it is barred by the statute of limitations.

Petitioners' cause of action under Section 301 against Navistar is without merit because it too is barred by the six-month statute of limitations that applies to such an action.

Petitioners' claim that Navistar violated their procedural due process rights under the Fifth Amendment was properly dismissed. Procedural due process rights obtain only where there is state action. In this case, the implementation and application of the Supplemental Letters of Understanding by Navistar, the conduct allegedly causing the deprivation of Petitioners' constitutional rights, cannot be attributed to the state.

The Seventh Circuit was correct in finding that Petitioners' causes of action under the LMRDA and Section 301 were barred by the applicable statutes of limitation. Moreover, for each of the reasons described above, all of which were raised as alternative grounds for summary judgment in Navistar's Motion For Summary Judgment, the courts below had alternative grounds to reject all of Petitioners' claims against Navistar.[3]

ARGUMENT

I. The LMRDA Does Not Provide Petitioners With A Cause Of Action Against Navistar.

Petitioners allege a cause of action under the LMRDA against Navistar because Navistar allegedly "knew or should have known that their [the Defendant Unions'] method of ratification of . . . [the] supplements to the Master Agreement violated the employees' 'Bill of Rights' under the [LMRDA], and, further was not in accordance with the Constitution and By-Laws of the Defendant Unions." [Plaintiffs' Amended Class Action Complaint For Injunctive Relief And Damages, para.33; *See* Appendix to Brief of the Union Respondents]. Specifically, Petitioners allege that Navistar has violated Sections 411(a)(1) and (2) of the LMRDA.

Sections 411(a)(1) and (2) of the LMRDA are part of the Bill of Rights guaranteed to members of labor organizations. These sections provide:

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[3] The District Court stated: "Although the Court believes the evidence would support defendants' arguments on the merits, the Court finds that it need not address the merits of the case because the action is barred by the statute of limitations." [Petitioners' Appendix, p. 19]

"(a)(1) *Equal Rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) *Freedom Of Speech and Assembly.*—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of the labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

In essence, the foregoing provisions protect a union member's right to fully participate in the official activities of his duly authorized bargaining representative. The statute does not grant union members any rights against their employer. The courts have unanimously held that the LMRDA does not provide union members with a right of action against their employer because these rights are directed exclusively to the protection of the relationship between the union member and his union. *See Abrams v. Carrier Corp.,* 434 F.2d 1234 (2d Cir. 1970), *cert. denied,* 401 U.S. 1009 (1971); *Pignotti v. Local 3, Sheet Metal Workers International Ass'n,* 343 F. Supp. 236 (D. Neb. 1972), *aff'd,* 477 F.2d 825 (8th Cir. 1973), *cert. denied,* 414

U.S. 1067 (1973); *Brotherhood of Railway, Airline and Steamship Clerks, Local 36 v. Brotherhood of Railway, Airline & Steamship Clerks, AFL-CIO*, 496 F. Supp. 1160 (E.D. Mich. 1980); *Christopher v. Safeway Stores, Inc.*, 476 F. Supp. 950 (E.D. Tex. 1979), *aff'd*, 644 F.2d 467 (5th Cir. 1981).[4]

A case similar to the instant matter is *American Postal Workers Union, AFL-CIO Headquarters Local 6885 v. American Postal Workers Union, AFL-CIO*, 665 F.2d 1096 (D.C. Cir. 1981). In that case, the circuit court held that the National Postal Union violated the LMRDA by refusing to submit a collective bargaining agreement to a local union for ratification. The plaintiff, the local union, alleged that its members' employer, the United States Postal Service, participated in the national union's breach of the duty of fair representation and fiduciary duty by entering into a covert agreement with the national union and by concealing the final round of negotiations from it. However, the circuit court noted that the Postal Service was required only to bargain in good faith with the employees' exclusive representative, and, in so doing, it was expected to represent its own interests, not those of the employees. The court stated: "[The Postal Service]

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[4] In *International Brotherhood of Electrical Workers, Local 336 v. Illinois Bell Telephone Co.*, 496 F.2d 1 (7th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974), the Seventh Circuit held that a union can sue an "interested employer" under Section 411(4) of the LMRDA in order to prohibit an employer from financing a union member's suit against his labor union. This Court agreed that a union member may not enforce the LMRDA against his employer. The sole action authorized against an employer by the LMRDA is that of a *union* against an *employer* for financing a judicial, administrative, or legislative action initiated by union members against their labor union.

had no duty, for example, to inform the local of the resumption of collective bargaining. . . . In this case, appellants do not allege that the Postal Service has *violated* a contract; in fact, they complained that the USPS has *adhered* to a contract with which they are dissatisfied." 665 F.2d 1109 [Emphasis added and in original]. Thus, the court found that the Postal Service's conduct during the negotiating process was not inconsistent with the provisions of the collective bargaining agreement or with any statutory responsibilities of the Postal Service. In rejecting the plaintiff's allegation that the LMRDA was enforceable by it against the Postal Service, the court stated: "Like the duty of fair representation and fiduciary duty, LMRDA Section [411(a)(1)] imposes no obligation on employers and creates no cause of action against them." 665 F.2d 1109. While the court found that Section 411(a)(1) of the LMRDA provided a remedy for the discriminatory denial of ratification rights by the national union, there was no cause of action under such provision against the employer, the Postal Service.

Petitioners in this case argue that the seniority lists at Navistar's plants should not have been combined. Of course, had Petitioners been employed at one of Navistar's closed plants, it is likely that they would have argued that the lists should be combined. In *Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees, Local 36 v. Consolidated Rail Corp., supra,* a local union representing a closed Conrail office in Detroit alleged that Conrail and the International Union conspired against the Local, in violation of the LMRDA. The Local argued that the seniority lists of the closed Detroit office should have been merged with the lists of the open offices. The district court rejected the

Local's argument and held that it had no jurisdiction over Conrail for the following reason:

> It is well-established that the LMRDA cannot support an action against an employer, even where a conspiracy between the employer and union is alleged. *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970); *Duncan v. Peninsula Shipbuilders Assoc.*, 394 F.2d 237 (4th Cir. 1968).

496 F. Supp. 1168.

In the instant case, the only relief Petitioners may seek under the LMRDA is against the Union, not Navistar. Accordingly, Navistar has no liability to Petitioners under the LMRDA.

II. Petitioners' Action Under The LMRDA Is Barred By The Statute Of Limitations.

Even if an action could be properly brought under the LMRDA by Plaintiffs against Navistar, it is barred in this case by the statute of limitations. Although the LMRDA does not provide an express limitations period for suits brought pursuant to it, a federal court must "borrow" the most appropriate limitations period from some other source. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). In this case, as it had ruled previously in *Vallone v. Local Union No. 705*, 755 F.2d 520 (7th Cir. 1984), the Seventh Circuit applied a six-month statute of limitations to an action under the LMRDA. *See also Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1284 (1986); *Linder v. Berge*, 739 F.2d 686 (1st Cir.

1984); and *Local Union 1397 v. United Steelworkers of America*, 748 F.2d 180 (3d Cir. 1984).[5]

Navistar fully concurs in and adopts the Union's discussion of the applicability of the LMRDA six-months limitations period to the instant case. For the reasons set forth in the Union's Brief, Navistar submits that the Seventh Circuit properly held Petitioners' LMRDA claim to be barred by the statute of limitations.

III. Petitioners' Cause Of Action Under Section 301 Is Barred By The Statute Of Limitations.

In *DelCostello v. International Brotherhood of Teamsters, supra,* this Court determined that, in a lawsuit brought by employees against their labor union and employer under Section 301, a six-month statute of limitations applies. The Seventh Circuit rejected Petitioners' argument herein that the statute of limitations for such a lawsuit is to be determined by Indiana state law and that a two-year statute of limitations for oral employment contracts should apply.

Prior to *DelCostello,* federal courts determined the appropriate statute of limitations in a Section 301 lawsuit by applying the most closely analogous statute of limitations under state law. This borrowing of state limitations periods, a "fallback rule of thumb" (462 U.S. 158, n. 12), was said to be appropriate in the absence of any direct

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[5] The Seventh Circuit's ruling does not conflict with either *Doty v. Sewall,* 784 F.2d (7th Cir. 1986) or *Rodonich v. Laborers, Local 95,* 817 F.2d 967 (2d Cir. 1987). Neither of those cases involved the formation of collective bargaining agreements, an issue to which the six-month limitations period applies. *DelCostello, supra* at 171.

indication in the legislative history of Section 301 suggesting that Congress expressly considered the statute of limitations problem. This Court in *DelCostello* supplanted the use of this "fallback rule of thumb" with a uniform statute of limitations which was designed to accommodate the balance of interests at stake in a Section 301 lawsuit against an employer and union.

In *DelCostello,* this Court determined that Section 10 (b) of the National Labor Relations Act, which established a six-month period for filing charges of unfair labor practices with the NLRB, represented a federal statute of limitations which contemplated the protection of interests at stake in a lawsuit under Section 301 where the union's duty of fair representation was also at issue. Thus, while this Court did not consider it necessary to determine that all breaches of a union's duty of fair representation are unfair labor practices, this Court stated that "[e]ven if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is a substantial overlap." 462 U.S. 170. This Court recognized that duty-of-fair representation cases involve allegations of unfair, arbitrary or discriminatory treatment of workers by unions—as do virtually all unfair labor practice charges filed by workers against unions. Similarly, this Court noted that an alleged violation by an employer of a collective bargaining agreement may also amount to an unfair labor practice. Thus, the similarity of the rights asserted in the context of an unfair labor practice proceeding before the NLRB and a Section 301 lawsuit alleging a breach of a union's duty of fair representation was an important consideration in choosing the

six-month statute of limitations for the Section 301/breach of duty lawsuit.

Moreover, this Court noted the close similarity of the considerations relevant to Section 10(b) and the limitations period chosen for a Section 301/breach of duty lawsuit. Quoting Justice Stewart's concurring opinion in *United Parcel Service v. Mitchell,* 451 U.S. 56 (1981), this Court stated:

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.' . . . Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, . . ., as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this."

462 U.S. 171 [Citation omitted].

Petitioners improperly rely on this Court's decision in *UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966). In *Hoosier Cardinal Corp.,* this Court was faced with a "straightforward breach of contract under § 301" (462 U.S. 162)—that is, the dispute in *Hoosier Cardinal Corp.*

was between a union and an employer. There was no allegation that a union breached its duty of fair representation. Thus, it was not a hybrid Section 301/fair representation claim. In such hybrid cases, the Court in *DelCostello* determined that a six-month statute of limitations should apply. In fact, the Court emphasized that its decision in *Hoosier Cardinal Corp.* was narrowly limited to the facts presented in that case. The Court stated in *Hoosier Cardinal Corp.*: "Whether other § 301 suits differ from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question." 383 U.S. 705, n. 7. Moreover, this Court stated:

> The suits at issue here, of course, are amalgams, based on both an expressed statutory cause of action [Section 301] and an implied one [breach of a union's duty of fair representation] . . . We need not address whether, as a general matter, such cases should be treated differently; even if this action were considered as arising solely under § 301 . . ., the objections to use of state law and the availability of a well-suited limitations period in § 10(b) would call for application of the latter rule.
>
> * * *
>
> *Auto Workers v. Hoosier Cardinal Corp.* was a straightforward suit under § 301 . . . for breach of a collective-bargaining agreement by an employer. Unlike the present cases, *Hoosier* did not involve any agreement to submit disputes to arbitration, *and the suit was brought by the union itself rather than by an individual employee.* We held that the suit was governed by Indiana's 6-year limitations period for actions on unwritten contracts; we resisted the suggestion that we establish some uniform federal period. Although we recognized that the "subject matter of § 301 is 'peculiarly one that calls for uniform law,' "

> "*. . . we reasoned that national uniformity is of less importance when the case does not involve "those consensual processees that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it,"*. . . . We also relied heavily on the obvious and close analogy between this variety of § 301 suit and an ordinary breach-of-contract case. We expressly reserved the question whether we would apply state law to § 301 actions where the analogy was less direct or the relevant policy factors different. . . .

462 U.S. 158, n. 12, 162, 163 [Emphasis added; citations omitted].

This Court has observed that a nationally uniform statute of limitations is of the utmost importance when a case involves the formation of a collective bargaining agreement. That process is the central issue raised in the instant case. Petitioners object to the ratification of an agreement that was the product of collective bargaining between Navistar and the Respondent Union. Petitioners assert that there has been a breach of the collective bargaining agreement between Navistar and Respondent Union which arose out of that alleged improper ratification. This case is a hybrid Section 301/duty of representation lawsuit which implicates and focuses on the right of Navistar and the Respondent Union to reach an agreement through collective bargaining. Thus, *DelCostello* requires the application of a six-month statute of limitations to Petitioners' action under Section 301. Accordingly, it is respectfully submitted that the Seventh Circuit's judgment, applying the six-month limitations period, does not warrant review by this Court.

IV. Navistar Was Entitled To Summary Judgment On Petitioners' Fifth Amendment Claim.

In their Second Amended Complaint, Petitioners attempted to add a constitutional dimension to their claims by raising the guarantees of the Fifth Amendment. It is submitted that this argument was correctly rejected by the courts below.

Private citizens are entitled to enforce the guarantees of the United States Constitution by bringing actions under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (hereinafter "Section 1983"). Section 1983 was enacted by Congress as a procedural or remedial device to enable individuals to seek relief for an alleged deprivation of a constitutional right. The statute provides that a "person" who, *acting under color of state law,* violates an individual's rights protected by the federal Constitution or "laws" of the United States, shall be liable to that person "in an action at law, suit in equity, or other proper proceeding. . . ."

An action under Section 1983 requires Petitioners to prove that Navistar's actions were in the nature of "state action." They contend that the state action requirement is fulfilled because the parties are "cloaked with sufficient governmental power." [Petitioners' Brief, p. 15]

This Court has repeatedly made clear that even the most extensive and detailed regulation of private activity does not transform such activity into state action. It is equally well-settled that the government's mere authorization of private conduct does not justify a finding of state action. The critical ingredient, completely absent in this case, is evidence of direct governmental influence on, or

responsibility for, the *specific* challenged action. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), the Court framed the state action inquiry as whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the state."[6]

This Court has frequently rejected the theories espoused by Petitioners. In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), this Court concluded that there was no state action in the employment termination of plaintiff by a private, not-for-profit school for maladjusted high-school students. This Court reached this result despite the following facts:

1. From 90 to 99 percent of the school's budget and income consisted of governmental funding;

2. The school had a contract with the Massachusetts Drug Rehabilitation Division which referred to the school as a "contractor" and which provided for reimbursement by the State for services provided to students referred to the school by the state agency;

3. The school was subject to extensive regulation of every facet of its operation, from personnel policies to record keeping;

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[6] The Seventh Circuit's judgment is not in conflict with *Beck v. CWA*, 776 F.2d 1187 (4th Cir. 1985), *aff'd on rehearing en banc*, 800 F.2d 1280 (1986), *cert. granted*, 55 U.S.L.W. 3807 (1987). Unlike *Beck*, this case raises no issue of First Amendment rights. Moreover, in *United Steelworkers v Weber*, 443 U.S. 193 (1979), the Court held that the negotiation of an affirmative action plan did not involve state action.

4. The school's contracts with state agencies imposed strict requirements concerning the educational services to be rendered; and

5. The plaintiff's salary was paid directly by a federal grant and state agency approval of the school's decision to hire the plaintiff was required.

In response to the plaintiff's argument in *Rendell-Kohn* that governmental direction of the school imbued the discharge decision with state action, this Court held that the relevant inquiry was not the extent of the regulation, but whether the decision to discharge was compelled or at least influenced by any state regulation. 457 U.S. 841. The school's overwhelming dependence on government funding was found to be "not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of government by reason of their significant or even total engagement in performing public contracts." 457 U.S. 841. The absence of any direct governmental involvement in the decision to discharge the plaintiff was fatal to her claim. *See also Blum v. Yaretsky*, 457 U.S. 991 (1982). State action is present "only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." 457 U.S. 1004.

Petitioners did not allege and could not show that the acts complained of were influenced by or compelled by the State. Accordingly, summary judgment was properly granted to Navistar as to Petitioners' Fifth Amendment claim and such judgment was properly affirmed by the Seventh Circuit.

CONCLUSION

The decision below is not in conflict with the decisions of this Court or any court of appeals. Navistar was entitled to the summary judgment granted by the District Court and affirmed by the Seventh Circuit. For the foregoing reasons, Navistar respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

U.S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Labor Management Relations Act,

29 U.S.C. § 185 [Section 301].

§ 185. *Suits by and against labor organizations*

(a) *Venue, amount, and citizenship*

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) *Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments*

Any labor organization which represents employees in an industry affecting commerce as defined in

this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) *Jurisdiction*

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) *Service of process*

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) *Determination of question of agency*

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person respons-

ible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Labor Management Reporting and Disclosure Act,

§§ 411 and 412.

§ 411. *Bill of rights, constitution and bylaws of labor organizations*

(a)(1) *Equal rights*

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) *Freedom of speech and assembly*

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as

to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) *Dues, initiation fees, and assessments*

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by ma-

jority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) *Protection of the right to sue*

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) *Safeguards against improper disciplinary action*

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) *Invalidity of constitution and bylaws*

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

§ *412. Civil action for infringement of rights; jurisdiction*

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

National Labor Relations Act,

29 U.S.C. § 160(b) [Section 10(b)].

(b) *Complaint and notice of hearing; answer; court rules of evidence inapplicable*

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the

rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(4)

No. 87-42

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

DONALD JOSEPH CLIFT, ET AL., PETITIONERS

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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26 pp

QUESTIONS PRESENTED

1. Whether the six-month statute of limitations period applicable to unfair labor practice charges under the National Labor Relations Act, 29 U.S.C. 160(b), is applicable to petitioners' claim under Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 411-415, alleging that a union has improperly denied certain union members the right to vote on ratification of a proposed collective bargaining agreement, where that claim is joined with allegations under Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185, that the union violated its duty of fair representation and the employer violated its obligations under a prior collective bargaining agreement.

2. Whether the claims raised in this case under the LMRDA and the LMRA, 29 U.S.C. 185, were initiated within six months of the accrual of the underlying cause of action.

3. Whether the alleged denial of voting rights by the respondent unions in this case involved sufficient governmental action to require that constitutional due process concerns be satisfied.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-42

DONALD JOSEPH CLIFT, ET AL., PETITIONERS

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are four employees of the Indianapolis, Indiana plant of respondent Navistar International Transportation Corp. (Navistar), formerly International Harvester Co. (Pet. App. A3). They were on layoff in early 1982 when, because of its precarious financial condition, Navistar entered into negotiations with the respondent unions, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Region 3 and Local 98 (UAW), concerning possible concessions on their existing collective bargaining agreement, which was scheduled to expire in October 1982 (*id.* at A3-A4). The negotiations between Navistar and the UAW culminated, in April 1982, in a ten-

tative agreement that created, among other things, a nationwide Master Recall system under which employees on layoff could fill openings at other Navistar plants (provided that no local employees were on layoff) and carry their existing seniority status to any such openings (*id.* at A4).

On May 2, 1982, the UAW notified its members of the tentative agreement, including the new Master Recall system, held meetings with these members to explain its terms and effects, and submitted the agreement to the members for their ratification (Pet. App. A4). A majority of the members of the local and international unions who participated in the ratification referendum approved the proposed agreement, which then became effective the next day—May 3, 1982 (*ibid.*). Petitioners did not receive special notice of the proposed agreement and were not permitted to vote in the ratification referendum, because the UAW did not consider them to be members in good standing entitled to vote (*ibid.*). See UAW Br. in Opp. 4 n.5 (describing UAW rule concerning who is entitled to vote).

Petitioners, along with all others then on layoff, were recalled to work at the Indianapolis plant in late 1982 and early 1983 (Pet. App. A5, A14). Subsequently, on March 7, 1983, the first of several hundred transferees from other plants arrived at the Indianapolis plant (*id.* at A5). Pursuant to the Master Recall system, the transferees were placed higher on the seniority list—and thus achieved greater layoff and recall rights—than some employees who had worked at the Indianapolis plant prior to the transferees' arrival, including petitioners (*ibid.*). Petitioners complained to Navistar and the UAW, but Navistar and the UAW would not process their claims through the grievance/arbitration system, and the UAW was unwilling to nullify the original ratification vote or to renege on its agreement with Navistar (Pet. 5-6).

Accordingly, on September 6, 1983, some sixteen months after the agreement was ratified but less than six months after the first transferee arrived at the Indianapolis plant, petitioners filed this suit against Navistar and the UAW (Pet. 6; Pet. App. A5). Petitioners alleged, inter alia, that the UAW had failed to provide them with notice of the proposed agreement, to explain the effect that the Master Recall system would have on them, and to respect their right to participate in the ratification referendum (Pet. 6-7; Pet. App. A5). The complaint, as amended, was read by the courts below as asserting violations of: (a) the union's duty of fair representation under the National Labor Relations Act (NLRA), 29 U.S.C. 159(a), enforceable under Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185; (b) the employer's obligations under the prior collective bargaining agreement, also enforceable under Section 301 of the LMRA; (c) the union member's "bill of rights," set forth in Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 411-415; and (d) the Due Process Clause of the Fifth Amendment (Pet. App. A5, A17-A18, A21). Petitioners charged that the union's acts deprived them of their rights under the seniority system of the prior collective bargaining agreement and prayed that the district court award them compensatory and punitive damages and enjoin the UAW and Navistar from enforcing the provisions of the new agreement, including the Master Recall system (Pet. 6-7; Pet. App. A5).

2. The district court granted the motions of the UAW and Navistar to dismiss or for summary judgment (Pet. App. A17-A22). Initially, it noted that "hybrid [Section] 301/breach of duty of fair representation claims are subject to the six-month limitations period in [Section] 10(b) of the National Labor Relations Act" (*id.* at A19, citing *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S.

151 (1983)). It further noted that "the Seventh Circuit Court of Appeals has held that the six-month period also applies to claims brought under Title I of the Labor-Management Reporting and Disclosure Act" (Pet. App. A19, citing *Vallone* v. *Local 705, Int'l Bhd. of Teamsters*, 755 F.2d 520 (7th Cir. 1984)). It then determined that these causes of action accrued on May 2, 1982, when the contract was ratified, because "[petitioners] should have known the meaning of the Master Recall List as of [that date]," and because "the new contract was reported in the local media and * * * a union member would have been able to determine when the ratification meeting was to be held" (Pet. App. A20, A21). Finally, the court refused to allow petitioners to add a due process claim to their complaint, stating that "the negotiation of the seniority provisions does not constitute state action" and "[t]he government * * * has not transferred traditional state functions to the union nor has it acted with the private parties in negotiating the contract" (*id.* at A21).

3. The court of appeals affirmed (Pet. App. A2-A16). It noted that, in *DelCostello* v. *International Bhd. of Teamsters, supra*, this Court "decided that in 'hybrid' [Section] 301 suits, involving both employer violations of the collective bargaining agreement and the union's failure to fairly represent the complaining employee, the appropriate limitation period to borrow is the six-month limitation period for unfair labor practices found in [Section] 10(b) of the NLRA" (Pet. App. A8). It rejected petitioners' argument that the instant case is distinguishable from *DelCostello* because the present case is closer to a straightforward contract dispute and involves alleged improprieties during contract negotiations rather than during the grievance process (*id.* at A9-A10). The court noted that, as in *DelCostello*, "this is a suit by individual employees against both the employer and the union," and "the primary dispute in this case concerns whether the

Union acted properly under federal laws controlling its decision-making processes." It thus reasoned that, "[s]ince this case involves a union's duties when negotiating a contract, an issue central to federal labor law, policy considerations favor a uniform statute of limitations," and "[a]n unfair labor practice is a more closely analogous cause of action" than is a breach of contract claim. Accordingly, it held that "the appropriate statute of limitations to apply to the LMRA claims is the six-month limitation period found in [Section] 10(b) of the NLRA" (*id.* at A10-A11).

The court further rejected petitioners' argument "that their LMRDA claims should not have been subjected to the six-month limitation period" (Pet. App. A11). It noted its prior decision in *Vallone* v. *Local 705, Int'l Bhd. of Teamsters, supra*, holding that "the reasoning in *DelCostello* applies equally to both LMRA [Section] 301 claims and claims under sections 411 and 412 of the LMRDA," and on that account applied the six-month limitations period of Section 10(b) of the NLRA, 29 U.S.C. 160(b), to petitioners' LMRDA claims (Pet. App. A11-A12).[1]

The court next rejected petitioners' alternative argument that their claims were filed within the six-month period (Pet. App. A12). It noted that "[t]he claims in this case concern the improper ratification of a collective bargaining agreement" (*ibid.*), and ruled that these claims must have "accrued when the collective bargaining agreement was entered into in May 1982, unless the existence of the

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[1] The court expressly refused to reconsider its earlier decision in *Vallone*, stating that "a number of circuits are in accord with the conclusion we reached in *Vallone*" (Pet. App. A12 n.5), and that the decision of the First Circuit in *Doty* v. *Sewall*, 784 F.2d 1 (1986), is distinguishable because it involved matters concerning neither "the bargaining process nor any grievance with [the individual's] employer" (Pet. App. A12 n.5).

new contract could not reasonably have been discovered until later and was not actually discovered by plaintiffs until later" (*id.* at A13). The court then found that each of the four petitioners either knew or should have known, through the exercise of reasonable diligence, of the existence and contents of the contract more than six months before they filed suit (*id.* at A14-A15). Accordingly, it held that "[t]he LMRA and LMRDA claims [are] time-barred for all four [petitioners]" (*id.* at A15).

Finally, the court affirmed the district court's rejection of petitioners' due process claim (Pet. App. A15). It stated that, "[a]bsent the requisite governmental action, there can be no claim for a denial of constitutional due process" (*ibid.*).

DISCUSSION

Three separate questions are "fairly included" (Sup. Ct. R. 21.1(a)) in petitioners' challenge to the decision of the court below. First is the question whether their claim under Title I of the LMRDA, alleging that the union improperly denied them the right to vote in the ratification referendum, is governed by the six-month limitations period applicable to unfair labor practice charges under the NLRA (Pet. 8-14).[2] Second, petitioners assert (Pet. 18-25) that they in fact initiated their LMRDA and LMRA claims within six months of the accrual of their underlying cause of action. Finally, they urge (Pet. 14-17) that the alleged denial of their voting rights by the respondent unions involved sufficient governmental action to require that constitutional due process concerns be satisfied. In our view, only the first of these questions is an appropriate

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[2] Petitioners apparently do not now dispute that their LMRA claims had to be initiated within that six-month limitations period.

candidate for certiorari review, although the third question is sufficiently similar to the "state action" question raised in *Communication Workers of America* v. *Beck*, cert. granted, No. 86-637 (June 1, 1987), to warrant holding this petition for disposition in light of the Court's judgment in that case.

1. With respect to the limitations period question, the court below held (Pet. App. A7-A12) that the six-month statute of limitations applicable to unfair labor practice charges under the NLRA applies to petitioners' claim under Title I of the LMRDA that the union improperly denied them the right to vote in the ratification referendum held with respect to the proposed collective bargaining agreement. While there is technically no conflict among the circuits on this point, there is substantial confusion among the circuits as to how the statute of limitations question is to be analyzed in an LMRDA Title I case. On balance, we believe that the question is sufficiently important to warrant review by the Court at this time.

a. Where a federal statute does not contain an express statute of limitations for actions brought under its civil enforcement provisions, as is true of Title I of the LMRDA,[3] this Court has said that it will " 'borrow' the most suitable statute or other rule of timeliness from some other source" (*DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. at 158). To identify which limitations period it will so borrow, the Court follows a two-step decision-process: First, it determines whether "a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.' " *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, Nos. 86-497 &

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[3] Section 102 of the LMRDA, 29 U.S.C. 412, provides that "[a]ny person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

86-531 (June 22, 1987), slip op. 6 (quoting *Wilson* v. *Garcia*, 471 U.S. 261, 272 (1985)). Having made that judgment, it then "inquir[es] whether a federal or state statute of limitations should be used" (*Agency Holding Corp.*, slip op. 4), keeping in mind that, with respect to this inquiry, " 'resort to state law remains the norm' " and that a federal statute of limitations should be borrowed only when federal law " 'clearly provides a closer analogy than available state statutes' " and " 'the federal policies at stake and the practicalities of litigation make that rule a significantly more appropropriate vehicle for interstitial lawmaking' " (*ibid.* (quoting *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. at 171-172)).

We are inclined to believe, in answer to the first inquiry, that a uniform statute of limitations is appropriate for claims under Title I of the LMRDA. Title I creates a "bill of rights" for union members, protecting their rights to speak, assemble, have an equal vote in union affairs, participate in union meetings, seek union office, receive a copy of collective bargaining agreements negotiated by the the union, and have due process protection against unfair union discipline. See 29 U.S.C. 411-415, 529; see generally *Local 82, Furniture Moving Drivers* v. *Crowley*, 467 U.S. 526, 536-537 (1984); *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 109-110 (1982). As the decisions of the federal courts of appeals evidence,[4] the various types of

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[4] See, *e.g.*, *Reed* v. *United Transp. Union*, 828 F.2d 1066 (4th Cir. 1987) (applying limitations period for unfair labor practice charges under the NLRA); *Doty* v. *Sewall*, 784 F.2d 1 (1st Cir. 1986) (applying limitations period for personal injury claims); *Trotter* v. *International Longshoremen's & Warehousemen's Union, Local 13*, 704 F.2d 1141 (9th Cir. 1983) (applying limitations period for liabilities created by statute); *Dantagnan* v. *I.L.A., Local 1418*, 496 F.2d 400 (5th Cir. 1974) (applying limitations period for breach of contract claims); *Sewell* v. *Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 445 F.2d 545 (5th Cir. 1971), cert. denied, 404 U.S. 1024 (1972) (applying limitations period for tort claims).

claims that may be brought under this "bill of rights" are similar to a wide range of common law and statutory causes of action. Thus, unless Title I claims are governed by a uniform characterization for limitations period purposes, there will be much unproductive litigation and considerable uncertainty for both LMRDA plaintiffs and defendants. In similar circumstances, this Court has said that there is no reason to believe that Congress would have sanctioned such an interpretation of the substantive federal statute. See *Wilson* v. *Garcia*, 471 U.S. at 274-275 (42 U.S.C. 1983); *Agency Holding Corp.*, slip op. 5-7 (RICO). Absent a compelling justification for treating certain classes of Title I claims differently, we are therefore inclined to believe that a single characterization of all such claims is appropriate.

Assuming that no such justification exists, the task of identifying a uniform statute of limitations does not seem an especially difficult one. Title I of the LMRDA is a kind of federal "civil rights" statute "aimed at enlarged protection for members of unions paralleling certain rights guaranteed by the Federal Constitution." *Finnegan* v. *Leu,* 456 U.S. 431, 435 (1982). Accord, *Doty* v. *Sewall,* 784 F.2d 1, 6 (1st Cir. 1986); *Rodonich* v. *House Wreckers Union, Local 95,* 817 F.2d 967, 976-977 (2d Cir. 1987). In the context of other statutes securing similar basic civil rights against violation by state or private action, this Court has said that the state law limitations period relating to personal injury actions should govern. See *Goodman* v. *Lukens Steel Co.,* No. 85-1626 (June 19, 1987), slip op. 3-4 (2-year state statute of limitations governing personal injury claims applies to claims under 42 U.S.C. 1981); *Wilson* v. *Garcia,* 471 U.S. at 276-280 (3-year state statute of limitations governing personal injury claims applies to claims under 42 U.S.C. 1983). Unless there are very good reasons to depart from this approach, it follows that the

relevant state limitations period for personal injury actions should govern claims under Title I of the LMRDA as well.[5]

b. Pursuant to its earlier decision in *Vallone* v. *Local No. 705, Int'l Bhd. of Teamsters,* 775 F.2d 520, the court below concluded (Pet. App. A11-A12 & n.5) that the decision in *DelCostello* v. *International Bhd. of Teamsters, supra,* requires that the six-month statute of limitations under the NLRA be applied to LMRDA claims such as this one, *i.e.,* LMRDA claims that are factually related to other allegations of improprieties by the union in negotiating a contract or pursuing a grievance on behalf of an employee. The question arises, therefore, whether *DelCostello* mandates a separate statute of limitations for these types of LMRDA claims. We believe that it does not do so.

In *DelCostello,* the Court was presented with a hybrid action under Section 301 of the LMRA alleging that the employer had breached a collective bargaining agreement and that the union had breached its duty of fair representation (462 U.S. at 163). In declining to apply a state law statute of limitations in that instance,[6] the Court in *DelCostello* stressed several factors that made Section 10(b) of the NLRA a "more apt [analogy] than any of the suggested state-law parallels" that might apply to this particular LMRA claim (462 U.S. at 169 (footnote omitted)). Specifically, the Court noted that a "hybrid" breach of

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[5] The State of Indiana, where this action arose, has a 2-year statute of limitations for actions relating to personal injuries (see Ind. Code Ann. § 34-1-2-2 (Burns 1986)), and that statute has been applied to other federal civil rights claims (see, *e.g., Ross* v. *Summers,* 630 F. Supp. 1267 (N.D. Ind. 1986); *Bell* v. *Metropolitan Sch. Dist.,* 582 F. Supp. 3 (S.D. Ind. 1983)).

[6] The Court had previously borrowed from state law in setting the appropriate limitations period for breach of contract actions by unions against employers. See *UAW* v. *Hoosier Cardinal Corp.,* 383 U.S. 696 (1966).

contract/duty of fair representation claim under Section 301 of the LMRA will often, if not always, also amount to an unfair labor practice under the NLRA (462 U.S. at 170); that, in such a case, the LMRA and NLRA actions implicate an identical balance of interests—*i.e.*, " 'the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system' " (*id.* at 170-171 (citation omitted)); and that substantial practical problems weigh against applying the available state law limitations periods for the breach of contract and unfair representation claims that are inextricably intertwined in this kind of Section 301 action (462 U.S. at 172; see also *id.* at 165-169).

Claims under Title I of the LMRDA, unlike hybrid breach of contract/duty of fair representation actions under Section 301 of the LMRA, will rarely amount to unfair labor practices under the NLRA. Title I claims allege violations of "union democracy," and thus are concerned with the internal operation of the union—*i.e.*, the relationship between union members, the union, and union officers. See *American Postal Workers, Local 6885* v. *American Postal Workers Union,* 665 F.2d 1096, 1109 & n.26 (D.C. Cir. 1981); *Hayes* v. *Consolidated Service Corp.,* 517 F.2d 564, 566 (1st Cir. 1975); *Abrams* v. *Carrier Corp.,* 434 F.2d 1234, 1250-1251 (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971). Claims under the NLRA, on the other hand, generally relate to matters involving an employee's relationship with his employer and ordinarily do not relate to an employee's relationship with the union structure. See *Kolinske* v. *Lubbers,* 712 F.2d 471, 481 (D.C. Cir. 1983); *Price* v. *UAW,* 795 F.2d 1128, 1133-1135 (2d Cir. 1986). An internal union matter may form the basis for an unfair labor practice charge only if it has a "substantial impact" on the employee's relationship with his employer or impairs a policy clearly embedded in the

NLRA. See, *e.g.*, *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95, 102-107 (1985); *International Bhd. of Teamsters, Local 310* v. *NLRB*, 587 F.2d 1176, 1183 & n.31 (D.C. Cir. 1978) (citation omitted). Even then, however, the elements of such an unfair labor practice charge will be distinct from the elements of an LMRDA case arising out of the same set of facts. The unfair labor practice charge will focus on the unequal employment status and impairment of NLRA policies allegedly caused by particular acts of the union, while the LMRDA case will focus on the unequal opportunity to participate in union affairs allegedly caused by those or other actions of the union. *Doty* v. *Sewall*, 784 F.2d at 6-7. Thus, while the unfair labor practice charge provisions provided an appropriate analogy in *DelCostello*, where the LMRA claims also resembled unfair labor practice charges, the same cannot be said here.

For similar reasons, it is clear that LMRDA claims will rarely, if ever, implicate the same balance of interests presented by a hybrid breach of contract/duty of fair representation action brought under Section 301 of the LMRA (or its parallel unfair labor practice charge under the NLRA). To be sure, in some circumstances, as in the case here, an LMRDA claimant may seek relief that affects not only the union but also the finality of a collective bargaining agreement or a private settlement reached under it. To whatever limited extent the LMRDA claimant may obtain such relief, and we do not think that he will be able to do so very often or to any significant degree,[7] the

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[7] The LMRDA governs only internal union affairs and thus LMRDA claims will only rarely require litigation about the meaning, content, or enforceability of the collective bargaining agreement. Further, LMRDA plaintiffs cannot obtain any relief that would require the undoing or renegotiation of a settled collective bargaining agreement, since most retroactive relief relating to the collective bargaining agreement would exceed the "minor" and "ancillary" provisions of an injunction to which the employer, who is not regulated by the

LMRDA claim, like the claims involved in *DelCostello,* will implicate the national interests in stable bargaining relationships and finality of private settlements that inform the choice of limitation periods under the NLRA and the LMRA. But, even in these circumstances, the LMRDA claim, unlike the LMRA claim involved in *DelCostello,* will also involve an allegation that the union has deprived an individual of his statutorily-created right freely to participate in union affairs. Congress did not purport to weigh this interest in the balance when it concluded, in Section 10(b) of the NLRA, that unfair labor practice charges should be governed by a six-month statute of limitations. Accordingly, it cannot be concluded either that such LMRDA claims are essentially the same as those authorized by the NLRA or that the balance of policy concerns at stake is indistinguishable from the balance struck by Section 10(b) of the NLRA.

Finally, the practical litigation problems that concerned the Court in *DelCostello* and that made resort to state law inappropriate are not applicable here. In contrast to the very short state limitations period governing vacation of arbitration awards considered by the Court in *DelCostello,* most if not all states allow their citizens at least one year in which to file personal injury actions. Such a limitations period plainly provides an aggrieved union

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LMRDA, could properly be subjected. See *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. at 168 n.17 (where employer cannot be sued, equitable remedy such as order to arbitrate cannot be imposed); *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399-401 (1982) (party who has not violated substantive rights of plaintiff may only be subjected to "minor" and "ancillary" provisions of an injunctive order). Rather, LMRDA plaintiffs will ordinarily be limited to relief solely against the union, which may include declaratory relief, compensatory damages, and possibly punitive damages. See *Parker* v. *Local Union No. 1466, United Steelworkers of America*, 642 F.2d 104 (5th Cir. 1981); *Christopher* v. *Safeway Stores, Inc.*, 476 F. Supp. 950 (E.D. Tex. 1979), aff'd, 644 F.2d 467 (5th Cir. 1981).

member with an adequate time period in which to attempt to vindicate his LMRDA rights. Cf. *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975) (borrowing one-year state law limitations period for enforcement of claim under 42 U.S.C. 1981). Moreover, unlike the LMRA claim at issue in *DelCostello,* which required proof of separate unlawful actions by both the employer and union, the LMRDA claim at issue here requires proof only of unlawful action by the union. Thus, resort to state law will not result in two different limitations periods being applied to the same claim. Finally, a limitations period longer than six months is not inappropriate here, as it was in *DelCostello,* since the LMRDA claim involves an added concern that the right of free participation in union affairs be secured. The Court has held equally long limitations periods appropriate for similar civil rights claims. See *Goodman* v. *Luken Steel Co., supra* (2-year limitations period applied to civil rights claim under 42 U.S.C. 1981); *Wilson* v. *Garcia, supra* (3-year limitations period applied to civil rights claim under 42 U.S.C. 1983).

In short, resorting to Section 10(b) of the NLRA rather than to state law for a statute of limitations to govern actions brought under Title I of the LMRDA does not appear to us to be appropriate. The considerations that made Section 10(b) the appropriate limitations period for "hybrid" LMRA claims do not apply with the same force to *any* LMRDA claim and, furthermore, there is an appropriate state law analogy for *all* such LMRDA claims—*i.e.*, the limitations period governing state law personal injury actions. While *some* LMRDA claims have the potential for disrupting the stability of collective bargaining relationships to some degree, *no* LMRDA claim has the potential for producing any greater degree of disruption than claims initiated under other federal civil rights statutes; and the Court has held that those federal civil rights claims should be governed by state limitation

periods relating to personal injury actions. See, *e.g.*, *Goodman* v. *Lukens Steel Co., supra*. We do not see a sound basis for reaching a different conclusion here.

c. The question remains, of course, whether the contrary judgment of the court below merits review by the Court at this time. The courts of appeals are in conflict about the appropriate statute of limitations to apply to so-called "freestanding" Title I claims—that is, those LMRDA claims that do not seek to set aside the results of the collective bargaining or grievance adjustment process.[8] But the courts agree that LMRDA claims which are joined with breach of contract/duty of fair representation claims under Section 301 of the LMRA (or its analogue under the Railway Labor Act) should be governed by the six-month limitations period applicable to unfair labor practice charges under the NLRA.[9] Since petitioners' LMRDA

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[8] Compare *Doty* v. *Sewall, supra* (applying state limitations period for personal injury claims to denial of union membership to dissident); *Rodonich* v. *House Wreckers Union, Local 95*, 817 F.2d 967 (2d Cir. 1987) (applying state limitations period for personal injury claims to union discipline against members of rival political faction); with *Local Union 1397* v. *United Steelworkers*, 748 F.2d 180 (3d Cir. 1984) (applying six-month limitations period applicable to unfair labor practice charges to union discipline imposed by international union on local union leaders); *Davis* v. *UAW*, 765 F.2d 1510 (11th Cir. 1985), cert. denied, 475 U.S. 1057 (1986) (applying six-month limitations period applicable to unfair labor practice charges to expulsion of dissident union member); *Reed* v. *United Transp. Union*, 828 F.2d 1066 (4th Cir. 1987) (applying six-month limitations period applicable to unfair labor practice charges to internal union dispute regarding reimbursement of officers' expenses).

[9] See, *e.g.*, *Adkins* v. *International Union of Elec. Workers*, 769 F.2d 330 (6th Cir. 1985) (six-month limitations period applicable to LMRA/LMRDA challenge to negotiation and implementation of collective bargaining agreements); *Vallone* v. *Local 705, International Bhd. of Teamsters, supra* (six-month period applicable to LMRA/LMRDA case involving modification of collective bargaining

claims are joined with a "hybrid" LMRA claim, they are of the latter variety and the decision below—holding that they must be brought within six months of the accrual of the underlying cause of action—does not technically conflict with the judgment of any other court.

Nevertheless, we are inclined to believe that the decision below is worthy of certiorari review at this time. As explained above, we think that the courts of appeals have incorrectly applied the six-month statute of limitations of the NLRA to LMRDA claims—both "freestanding" and those joined with hybrid LMRA claims. There is no reason to believe that these courts of appeals will reconsider the position they have taken. Nor is there reason to delay consideration of the question until a more precise circuit conflict develops. The conflict that now exists in the circuits with respect to whether the reasoning of *DelCostello* applies to "freestanding" LMRDA claims explicates the competing approaches and considerations that are necessary to a proper understanding of the statute of limitations issue for all LMRDA claims. Moreover, statute of limitations questions arise in LMRDA actions with some frequency and, if our position is correct, cases are predominantly being decided under an inappropriately short limitations period. Finally, until the Court resolves the question, a large number of plaintiffs will have a perverse incentive to abandon potentially timely LMRA claims in order to ensure that their LMRDA claims are characterized as "freestanding" and not subjected to statute of limitations objections. Neither the LMRA nor the LMRDA is served by such results. Accordingly, this Court's immediate attention seems desirable.

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agreement); *Linder* v. *Berge*, 739 F.2d 686 (1st Cir. 1984) (six-month period applicable to Railway Labor Act/LMRDA claim based on employment-related grievance). See also *Grasty* v. *Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123 (3d Cir. 1987) (six-month period applicable to LMRA/LMRDA claim that union violated its constitution by fraudulently engineering strike vote and failing to pursue grievances).

2. The question whether petitioners initiated their LMRDA and LMRA claims within six months of the accrual of their underlying cause-of-action does not, however, merit review by this Court. The Court has previously held that a claim that a union and an employer have unlawfully entered into an otherwise valid collective bargaining agreement accrues when the agreement is executed and the employees are notified of it. See *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB*, 362 U.S. 411, 416-419 (1960) (*Bryan Mfg.*). Here, petitioners' LMRDA claim is that the UAW used an illegal ratification procedure prior to entering into this agreement; thus, the decision in *Bryan Mfg.* is directly applicable and the court below correctly held that petitioners' LMRDA claim accrued "when the collective bargaining agreement was entered into in May 1982, unless the existence of the new contract could not reasonably have been discovered until later and was not actually discovered by plaintiffs until later" (Pet. App. A13). Cf. *United Indep. Flight Officers* v. *United Air Lines*, 756 F.2d 1262, 1273 (7th Cir. 1985) (duty of fair representation claim based on entry into collective bargaining agreement accrues when contract is signed). The remaining issue raised by petitioners—*i.e.*, whether "genuine issues of fact" exist concerning whether petitioners knew or should have known more than six months before they filed suit of the existence of the allegedly unlawful ratification procedure and resulting contract approval (Pet. 20-25)—does not present either a federal question of substantial importance or a question as to which the courts of appeals are in conflict.

3. Nor do we believe that the third question raised by petitioners—*i.e.*, whether the alleged denial of voting rights by the respondent unions in this case involved sufficient governmental action to require that constitutional due process concerns be satisfied—merits plenary review by the Court. As explained in our amicus curiae brief

(filed at the Court's request) in *Communication Workers of America* v. *Beck*, cert. granted, No. 86-637 (June 1, 1987),[10] the United States does not believe that the mere failure by Congress to prohibit a union from engaging in or failing to engage in certain actions is a sufficient basis upon which to find "state action." Thus, in *Beck*, the United States has argued that the Court should decline to find state action arising out a union's use of agency fees collected pursuant to a union security agreement that is not proscribed by Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3). Similarly, here, the United States would argue that no "state action" is involved when a union uses a voting rule that arguably is not proscribed by Section 101 of the LMRDA, 29 U.S.C. 411. Indeed, the Court has already declined to find "state action" in a closely analogous LMRDA context. See *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 121 n.16 (1982) (union rule determining who may contribute to candidates in union election is not attributable to the state and thus cannot be challenged on First Amendment grounds). But the question is sufficiently similar to the "state action" question in *Beck* to warrant holding the petition for disposition in light of the Court's judgment in that case.

CONCLUSION

The petition for a writ of certiorari should be granted limited to the question whether petitioners' Title I LMRDA claim is governed by the six-month limitations period applicable to unfair labor practice charges under the NLRA. With respect to the question whether the alleged denial of voting rights by the unions in this case in-

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[10] We are providing copies of our *Beck* brief to counsel for petitioners and respondents.

volved sufficient governmental action to require that constitutional due process concerns be satisfied, the petition for a writ of certiorari should be held pending the Court's decision in *Communication Workers of America* v. *Beck*, No. 86-637.

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